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REPORTS

OF

CASES

OF

Controverted Elections,

IN THE

SIXTH PARLIAMENT

OF THE UNITED KINGDOM.

BY

UVEDALE CORBETT,

AND

EDMUND ROBERT DANIELL Esqrs.

BARRISTERS AT LAW.

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FROM the nature and constitution of the Tribunal before which cases of controverted Elections are tried, the proceedings necessarily run to considerable length, not only in the arguments which arise on points of Law or Practice, but also in the statement and proof of Facts upon which it is equally the duty of a Committee to decide. This mixture of matter renders the task of the Reporter more difficult than it would be if he had simply to report the proceedings of a trial at *Nisi Prius*, or an argument *in Bank*, in which the subject of discussion is generally reduced to a few distinct points. Those Gentlemen who have reported the earlier Election Cases have given a very detailed account of the proceedings of the Committees before which they were heard; and the Profession are much indebted to them for the accuracy with which they have reported not only the points of Parliamentary Law which were then decided, but also the more minute Rules of Practice which Committees have laid down for their future guidance. With these

rules it was important the public should be made acquainted, and that could only be done in an intelligible manner, by giving an accurate history from day to day of the proceedings. Mr. Serjeant Blosset, who commenced his Reports at a later period, and when the course of proceedings before Committees was better understood, and the more prominent points of Parliamentary Law had become defined and familiar, adopted a more compendious method of reporting. It has been the wish of the Editors to keep, as much as possible, this valuable model in view, but at the same time, where practicable, to render their Reports more concise. They have therefore not reported any case, or parts of cases, where matters of fact and not of law were in issue; and in such as they have reported, they have endeavoured to state the points raised, the evidence given, and the argument of counsel, as shortly as could be done consistently with perspicuity.

The decisions of the Committee on the *Bossiney* Election having been overruled by subsequent determinations, the Editors have thought it best to omit that case: they have also to regret that, having been themselves prevented from attending the proceedings in the case of *Tamworth*, it has not been in their power to procure such a note of what took place, as they could with propriety submit to the public.

The Editors gladly avail themselves of this opportunity to express their obligations, both to the Counsel and Agents employed in the different Cases, for the great readiness and kindness with which they have invariably assisted them with the materials necessary for this work.

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ERRATA.

Page 48, line 28, for *extemporanea* read *contemporanea.*
— 64, — 6, — *guesta* read *gesta.*
— 66, — 10, — *elosed* read *chosen.*

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REPORTS OF CASES

OF

Controverted Elections.

CASE I.

THE BOROUGH OF LEOMINSTER, IN THE COUNTY OF HEREFORD.

The Committee was chosen on Thursday, Feb. 11, 1819, and consisted of the following Members:

Sir C. Morgan, Bt, (*Chairman*)	Samuel Walker, Esq.	
Wilson A. Roberts, Esq.	Samuel Scott, Esq.	
Hon. F. G. Calthorpe,	William Leake, Esq.	
Thomas Wilson, Esq.	—— Stewart, Esq.	
Robert J. Wilmot, Esq.	Sir James Mackintosh, for the Petitioners.	Nominees.
Wm. Selby Lowndes, Esq.		
John Mitchell, Esq.	William Holmes, Esq. for the Sitting Member.	
Wilbraham Egerton, Esq.		
William Rickford, Esq.		

Petitioners.	Electors.
Sitting Members.	Sir J. W. Lubbock, Bart. and Sir W. C. Fairlie, Bart.
Counsel for the Petitioners.	Mr. Warren and Mr. Davis.
Counsel for Sir W. C. Fairlie.	Mr. Harrison and Mr. Male.

THE petition stated, that Sir J. W. Lubbock, Sir W. C. Fairlie, and John Harcourt, Esq. were candidates at the last election, to serve for the borough of *Leominster*; and that immediately after the nomination, Petition.

and before the commencement of the poll, Sir W. C. Fairlie was requested by Mr. Harcourt and three voters, to take the qualification oath prescribed to be taken by candidates by 9th Anne, c. 5, whereupon Sir W. C. Fairlie tendered an oath in writing, which he declared himself ready and willing to take, which oath stated the property in right of which he claimed his qualification, to be situate in the parish of Dundonald in the county of Ayr in Scotland, and also in the parish of Yoxford in the county of Suffolk, in England; whereupon it was objected, on behalf of Mr. Harcourt, that the description of property given in by Sir W. C. Fairlie was not sufficient under 9th Anne, c. 5. to entitle him to serve in parliament for the borough of Leominster, as that statute enacted, "that such lands, tenements, &c. should be within that part of Great Britain called England, the dominion of Wales, and town of Berwick-upon-Tweed:" that Sir W. C. Fairlie then proposed to amend his qualification, by the addition of funded property in the 3 per cent. consols, which amendment the returning officer refused to receive. That Sir W. C. Fairlie was again requested as before to take the oath prescribed by the statute, which he refused to do, and that by virtue of such refusal, Sir W. C. Fairlie became incapable of serving for the borough of Leominster at that election, and that upon such refusal, the returning officer ought to have returned Sir J. W. Lubbock and Mr. Harcourt; but that the returning officer, at the demand of Sir W. C. Fairlie, proceeded to take a poll, when notice was given on behalf of Mr. Harcourt, to all voters as they came to the poll, that Sir W. C. Fairlie was disqualified, not having taken the oath prescribed by the 9th of Anne; and that after a considerable time had elapsed, and many voters had polled, Sir W. C. Fairlie, at the request of one of his own voters, took the qualification oath, stating that he had before forgotten his estates in England; and that the returning officer, in

administering such oath after it had been refused as aforesaid, acted contrary to law, and also that the qualification sworn to by Sir W. C. Fairlie was a fictitious qualification, and not of the value of 300*l.* per annum, and the conveyance of such pretended qualification fraudulent, and not stamped according to law; and that Sir W. C. Fairlie is not now, nor was at the time of such election, seised of any sufficient estate in law or equity, to qualify him to serve in parliament for the borough of Leominster.

The petition likewise contained a charge of bribery and treating, upon which heads no evidence was offered, and concluded with a prayer that the return of Sir W. C. Fairlie be declared void and, Mr. Harcourt duly elected.

Facts of the case.

The material facts of this case proved in evidence were as follows: On the 20th day of June, Sir J. W. Lubbock, Bart., Sir W. C. Fairlie, Bart., and John Harcourt, Esq., were proposed as candidates to represent the borough of Leominster in parliament. When Sir W. C. Fairlie was nominated, Mr. Harcourt and three electors requested Sir W. C. Fairlie to take the qualification oath, as required by 9 Anne, c. 5, which he appeared willing to do, and a form drawn upon parchment by the deputy town-clerk, with blanks for the particulars of the property intended to be inserted, was handed to him. These blanks were filled up by Sir W. C. Fairlie, with lands lying in the parish of Dundonald, in the county of Ayr in Scotland, and in the parish of Yoxford in the county of Suffolk, in England *.

* It was not contended, at the trial of this petition, that lands, &c. situate in Scotland, did confer a qualification within the meaning of 9 Anne, c. 5, to sit for any county, borough, &c. in England or Wales, that statute confining the qualification to land, &c. "lying or being within that part of Great Britain called England, the dominion of Wales, and the town of Berwick-upon-Tweed." Scotch property, however, now stands on the same footing as that situate either in England or Wales, 59 Geo. III, c. 37.

The counsel for Mr. Harcourt then objected, that Scotch property did not confer a qualification, and read the words, 9 Anne, c. 5. s. 1.; and as Sir W. C. Fairlie declined to put in any other qualification, they contended that the poll should not proceed, and that Sir J. W. Lubbock and Mr. Harcourt ought to be returned, on the ground that Sir W. C. Fairlie, by refusing to take the oath prescribed by 9 Anne, c. 5. s. 5, had declared himself ineligible to sit in Parliament for that borough; and consequently could not be considered any longer as a candidate.

Sir W. C. Fairlie and several of the voters however, demanded, that the poll should proceed, with which demand the returning-officer complied; and notice was then given by the counsel and agents for Mr. Harcourt, to each voter as he came up to poll, that Sir W. C. Fairlie was disqualified, not having taken the qualification oath when requested, pursuant to the provisions of the statute of Anne; and that, consequently, any votes given for him, after such notice of disqualification, would be thrown away. Four hundred notices to the same effect, were, likewise, immediately printed and distributed throughout the court and the town.

The poll commenced a little before one o'clock, and continued about three hours, during which time, notice was given, on the part of Mr. Harcourt, to all voters who tendered for Sir W. C. Fairlie, that he was ineligible; when one Beach, an agent of Sir W. C. Fairlie, desired Wm. Davies, a voter, who had received notice at the poll of the disqualification of Sir W. C. Fairlie, (but who nevertheless persisted in voting for him,) to request Sir W. C. Fairlie to take the qualification oath; with which request Sir W. C. Fairlie immediately complied, describing his property as lying in the parishes of Bycton and Stanton, in the county of Hereford.

After Sir W. C. Fairlie had taken the oath, Mr. Harcourt's agents discontinued their notice to the voters as

they came up, and the poll proceeded; and, eventually, Sir W. C. Fairlie was returned, together with Sir J. W. Lubbock, by a majority of votes.

It further appeared in evidence, that during the interval between one and half-past-three o'clock, Sir W. C. Fairlie left the court, and entered into an agreement with a Mr. and Mrs. Woodhouse for the purchase of an estate in Herefordshire, of the value of 345 *l.* per annum. The estate had been settled by Mr. Woodhouse, at the time of his marriage, on his wife for life, with remainder to the children of the marriage, and in default thereof, to himself in fee. They had no children, and she was 56 years of age. This agreement was made, and was immediately reduced into writing, and the title-deeds deposited in the hands of a third person; and at the same time Sir W. C. Fairlie gave Mr. Woodhouse a cheque upon Messrs. Marsh, Sibbald, and Co. bankers, in London, on an unstamped piece of paper, for 8,000 *l.*; and the joint bond of Mr. Coates, his agent, and himself for 3,000 *l.* more. No money whatever passed, till the 23d of November, when Mr. Woodhouse received the 8,000 *l.* at Marsh and Co.'s; Sir W. C. Fairlie had possession of the title-deeds, but no conveyance was ever made, nor did any change of possession take place; and on the day following, the 24th, Mr. Woodhouse, at the request of Sir W. C. Fairlie, repaid him the 8,000 *l.* by cheque; upon which, Sir W. C. Fairlie, at the request of Mr. Woodhouse, delivered the title-deeds belonging to the estate, into the hands of Mr. Woodhouse's attorney. No money passed afterwards, nor was any conveyance made. Mr. Woodhouse, however, stated, that he had before been in treaty for the sale of the estate, and would have conveyed it to Sir W. C. Fairlie, if he had received the purchase-money.

It was also in evidence, that during the same interval Sir W. C. Fairlie entered into an agreement for the purchase of another estate, from his agent, Mr. Coates, for

the consideration of 6,000*l.*; Mr. Coates agreeing to convey when called upon, and Sir W. C. Fairlie to pay the money as Mr. Coates should direct; no money however appeared to have been paid, nor any conveyance executed, in consequence of this agreement.

Upon this evidence it was argued on behalf of the petitioners:—

Argument for the petitioners.

1st. That Sir W. C. Fairlie having refused to take the qualification oath, when duly requested, ought not from that time to have been considered as a candidate, but that it then became the duty of the returning-officer to have returned Mr. Harcourt, together with Sir J. W. Lubbock, there being, in point of law, no third candidate.

And 2dly.—That Sir W. C. Fairlie did not subsequently acquire any such qualification, as is required by 9th Anne, c. 5.

1st. The provisions, 9th Anne, c. 5. are clear; s. 1. describes the qualification; s. 5. the oath to be taken; and s. 7. directs, that, "if any candidate or person proposed to be elected as aforesaid, shall wilfully refuse, upon reasonable request to be made at the time of the election, or at any time before the day upon which parliament by the writ of summons is to meet, to take the oath hereby required, then the election and return of such candidate or person shall be void." It appears therefore, that a refusal, on request, avoids a return in this case: there was a request and refusal at the time of election; which refusal precluded Sir W. C. Fairlie from being returned.

Refusal.

A wilful refusal once made cannot be purged by any subsequent compliance. In the case of an act of bankruptcy, if a clear and unequivocal act of bankruptcy be committed, it cannot be explained by any subsequent circumstances (1). In this case, the demand and refusal were unequivocal, and the words of the statute positive.

(1) *Colkett* and others assignees of *Felch* v. *Freeman* and another, 2 T. R. 59.

"If a condition is to be performed immediately, a person shall have reasonable time to perform it according

to the nature of the thing to be done; so if it be to be performed upon demand. But if he refuses upon demand, it is broken, though he performs it within a reasonable time afterwards."(2) Thus "if a tenant cutteth down trees for reparations, and selleth them, and after, buyeth them again, and employs them about necessary reparations, yet it is waste by the vendition."(3) Likewise in parliament, when Sir John Leedes not having taken the oaths, sat a quarter of an hour in the House of Commons, it was held that he was thereby disqualified to serve for that parliament, and a new writ ordered. (4) The resolution of the House of Commons, in the case of *Malden*, 18 Journ. 129, cannnot be considered as establishing a contrary doctrine, though the wording of it at first sight might appear to support such an opinion; that decision probably proceeded from a confusion between the time at which Mr. Serjeant Comyns was requested to take the oath, and that during which, he was liable to be requested to do so.

(2) Com. Dig. tit. Condition, 102, G. 5.

(3) Co. Litt. 67. I.

(4) 2 Hat. Prec. 90.

Case of *Malden*.

The object which the statute had in view, was to enable electors at the time of election, to ascertain whether those offering themselves as candidates, were qualified as representatives; it cannot therefore be contended, that a voluntary taking of the qualification oath, subsequently to a refusal, when legally requested so to do, can purge the first refusal, so as to render the candidate eligible, and place him in the same situation he was in before refusal.

Votes thrown away.

It is also a principle of law frequently recognized, that where a candidate for any situation is notoriously disqualified, and notice is given of such disqualification to the electors, all votes subsequently given for such candidate are void (5), and this, whether the disqualification is made known before or after the commencement of a poll (6); and where notice of disqualification has been given at the time of election, and a candidate so disqualified has been returned, committees of the

(5) *Taylor* v. *The Mayor and Aldermen of Bath*, B. R. Mich. 15, G. 2, Cit. 3, Luders 324, in note, district of Kirkwall.

(6) *Rex* v. *Hawkins*, 10 East, 211.

House of Commons have seated the petitioner *. In this case, there existed a positive disqualification, created by statute, of which no one is to be presumed ignorant, and published by the candidate himself at the time of election, by his refusal to comply with the provisions of 9 Anne, as well as by the notice given by his opponent; and from the cases cited, it appears, that where a man at the time of election is notoriously ineligible, he is to be considered as one not *in esse* for the purposes of such election. Then where there are but two candidates, the duty of the returning-officer is ministerial only, and he is bound to return the candidates proposed (7). In this case, Sir W. C. Fairlie declined, when duly requested, to swear to the possession of such a qualification as is prescribed by 9 Anne, c. 5., and having so refused, the same statute enacts, that his return shall be void. His disqualification therefore is created by statute, and published by Sir W. C. Fairlie himself, which brings this case completely within the principle of those already cited, and no other candidate remaining besides Sir J. W. Lubbock and Mr. Harcourt, the sheriff was bound to have returned.

(7) *Nottingham*, 1 Peckwell 77.

* *Kircudbright*, 1 Luder 72, in note to *Ipswich*; 1 Peckwell 500, in note to *Radnorshire*; 2 *Southwark*, and 2 *Canterbury*, Clifford; in each of these cases, the petitioning candidate had produced the resolution of a committee of the House of Commons, declaring their opponent guilty of bribery and treating at the preceding election. *Vide etiam. Fife County*, 1 Luder 455, in note to *Colchester*, where notice was given to the electors, that General Skene held the office of baggage-master, which disqualified him from sitting in parliament. *Flint County*, 1 Peckwell, 526, in which case, notice was given, at the time of election, that Sir Thomas Mostyn was under age. In this case, the return was resolved to have been vexatious. In *Taylor* v. *the Mayor and Aldermen of Bath*, *ante*. Notice was given that Taylor was non-resident, which rendered him ineligible; and in *Rex* v. *Hawkins*, the electors had notice that Hawkins had not received the sacrament within twelve months, which it was necessary he should have done to fill a corporate office, under 13 Car. II, c. 12.

them. In the case of *Flint*, where Sir Thos. Mostyn's want of age was notorious at the time of election, not only was Mr. Lloyd seated, but the return of Sir Thos. Mostyn was resolved by the committee to have been vexatious.

Qualification.

2dly. Supposing the committee should hold that a subsequent qualification could be acquired, and sworn to, during the poll, so as to purge the prior refusal to take the oath; still in the present case, Sir W. C. Fairlie had not procured any such estate, either in law or equity, as would confer a qualification such as is required by the 9th of Anne, which is to be (8) "an estate freehold or copyhold for his own life, or for some greater estate, either in law or equity, to and for his own use and benefit, of or in lands, tenements, or hereditaments, over and above what will satisfy and clear all incumbrances that may affect the same." With respect to the property supposed to have been obtained from Mr. and Mrs. Woodhouse, there are no circumstances to show that it was a *bonâ fide* transaction, but quite the contrary; it appeared they had not even the power to convey. No conveyance has in fact been executed, nor was any money paid till the month of November, and then it was repaid to Sir W. C. Fairlie the next day. The cheque given by Sir W. C. Fairlie in June, to Mr. Woodhouse, was drawn at Leominster on a banking house in London, on unstamped paper, and therefore a nullity; and it is not pretended that Sir W. C. Fairlie has ever been in possession of any part of the property; the whole transaction therefore appears colourable. The agreement of Mr. Coates to convey when called upon, and of Sir W. C. Fairlie to pay as directed, was also colourable:—Mr. Coates was the attorney and agent of Sir W. C. Fairlie, and it does not appear that any thing took place in pursuance of such agreement, or that it was followed up by any change of possession. So that the committee must see that in neither case had Sir W.

(8) 9 Anne, c. 5, s. 1.

That derived from Mr. Woodhouse,

That from Mr. Coates.

C. Fairlie acquired a sufficient estate, either in law or equity, to enable him to represent the borough of Leominster in parliament.

Argument for the sitting member.

The following is the substance of the argument for the sitting member.

If qualified at the return sufficient, *Bristol case*, 1786. (9) Simeon 2d. edit. P. 51; Orme 281.

1st. There is no case which shows, that it is absolutely necessary that a candidate should be qualified at the commencement of the poll, or that the subsequent acquisition of a qualification is insufficient; on the contrary, it has been decided, in the case of *Bristol*, 1786 (9), that a qualification executed during the poll was sufficient. If this argument be conceded, namely, that a qualification may be legally acquired after the poll has commenced, then, it cannot be contended, that the short interval of three hours between the time when the request was made and complied with, will vitiate the qualification subsequently given in, and sworn to, by Sir W. C. Fairlie. A candidate ought to have reasonable time allowed him, to comply with the request to deliver in and swear to his qualification, as it may be necessary for him to consult either his attorney or his papers, before he can correctly state the particulars. But a question will arise, whether the act of Anne is imperative on the candidate to deliver in and swear to his qualification immediately on request, or whether he has not the whole of the time, till he takes his seat, to do so; and whether the words, "*such election and return*," ought not to be construed in the alternative. If so, a compliance with the demand before a member takes his seat is sufficient. Mr. Harcourt must be considered as having conceded these positions, because, after Sir W. C. Fairlie had taken the oath, he discontinued his notice to the electors, from which period he must be held to have waved his objection; for to render a candidate ineligible by disqualification, notice must be given of such ineligibility, and no notice having been given after three o'clock, the objection then

ceased. We are willing to give up all votes polled before that time, so that the only question will be, whether or not, the qualification subsequently given in by Sir W. C. Fairlie was sufficient. It is contended, that either was sufficient. No attempt has been made to show that they are not of sufficient value. The resolution (1) of the House of Commons requires every person, whose qualification is expressly objected to, in any petition relating to his election, within fifteen days after the petition is received, to deliver in the particulars of his qualification, to the clerk of the House of Commons. This is done, that the petitioner may have an opportunity of inquiring into the sufficiency of the qualification relied on; but it must rest with him to prove the insufficiency, otherwise it must be presumed to be correct. Sir W. C. Fairlie has a good qualification on the table, which the petitioners have not been able to negative; of which they have had proper information, and which, therefore, it is to be presumed, they cannot negative, consequently it must be taken to be good. Equitable estates are sufficient to confer a qualification under the statute: in this case, the party had an equitable estate, which he could, at pleasure, turn into a legal one; there is no pretence to presume fraud, and the value is sufficient. Woodhouse and his wife were able to convey, one the estate for life, the other the reversion. But, supposing the qualification of Sir W. C. Fairlie should be deemed by the committee to be insufficient, that is not to prevent his being considered as a candidate. How is a returning officer to decide on such a case? It may be a nice question of law, at all events it is one of inquiry. No one has ever been held incapable of standing, because he was accused of bribery or treating. In the case of *Abingdon* (2), where the sheriff of Berks was a candidate, and, being returned, was petitioned against, the House of Commons held, not that the electors had lost their

(1) 18 Jour. 629, 21 Nov. 1717, Orme 282, Resolution of H. C.

Qualifications given insufficient.

(2) *Abingdon case*, 1 Dougl. 419.

franchise, but merely that the election was void. So, in this case, if Sir W. C. Fairlie should be considered not duly qualified, the committee ought to declare the election simply void, and not seat Mr. Harcourt; because, if the election be declared merely void, the sitting member, having cured his want of qualification, may stand again. In all cases, where a candidate has been declared ineligible after notice, there has been some certain and positive notorious disqualification existing, not one to be made matter of discussion. In the second *Southwark* case, Mr Tierney's notice was, not that Mr. Thellusson had been guilty of treating, but that a committee of the House of Commons had declared, that he had been guilty of treating at the prior election; so also was it in the case of *Kirkudbright*.

2 Southwark. Clifford.

The committee resolved,

"That Sir W. C. Fairlie, not being qualified, is not duly elected;—that John Harcourt, Esq., was duly elected, and ought to have been returned;—that the opposition of Sir W. C. Fairlie to the petition, did not appear to be frivolous or vexatious" (3).

(3) Votes 15 Feb.

NOTE.

AN apology, perhaps, may seem due for offering to the public the present note, as they are already in possession of the able and careful collection of authorities on this head, in the note of Mr. Serjeant Blosset to the case of *Radnorshire*, in his 1st volume. It is, however, a point, on which some uncertainty still remains, and one on which it would have been desirable that the decision of the Committee in the present case should have been more explicit. If that decision had passed in direct terms, it would have been the best comment on prior determinations; but that not being the case, it is hoped, the editors will not be looked upon as captious or running into repetition, if they endeavour to draw some inferences from the cases already decided, explanatory of the

(1) Vol. 1. p. 496.

principle contended for on the part of the petitioners in the present instance, particularly as the impression upon their minds, after a careful perusal of the cases, is, that the current of authorities does appear more uniform, and the principle afforded by the cases, more precise and useful, than Mr. Serjeant Blosset (2) appears to have considered it. They contend that this principle at least, has been established, that where the disqualification is created by statute, and the fact bringing the party within the operation of the act, is uncontradicted and notorious, a candidate labouring under such disqualification, is no longer eligible, and is for the purposes of the then election, to be considered as one not *in esse*; and that this principle is established, both by decisions of the House of Commons and of the Courts of Law. The two leading cases in the courts of Law are *Taylor* v. *the Mayor and Aldermen of Bath*, and *R.* v. *Hawkins*. In both these cases, the candidates stood for corporate offices, to fill which, both were disqualified, one by act of parliament, the other by the charter of that corporation, of which he sought to be elected a member. In both instances, notice was given to the electors of the disqualification of the candidate, and in neither, was the fact creating the disqualification disputed; and in both cases, the court of King's Bench, held that all votes given for the candidate after notice of disqualification, were thrown away. Committees of the House of Commons have decided in several cases, where a candidate, at the time of nomination, laboured under a disqualification created by statute, and of which disqualification notice had been given to the electors, that such candidate was ineligible, and that all votes given for him, after notice of his disqualification, were thrown away. The only doubt to be raised on the position at present contended for seems to be this, namely, what shall be considered sufficient evidence, by the returning-officer, of a party coming within the disqualifying clause of the act. To this it is answered, that decided cases show, that where there has been either the judgment (3) of a court of competent jurisdiction, or where the fact is uncontradicted (4) by the party against whom notice is given, that in such cases, the returning-officer is bound to take notice of the application of the law. Then

(2) Note to Radnorshire, vol, 1, p. 500.

(3) 2 *Southwark*, 2 *Canterbury* *Kircudbright*.

(4) Fife County, Flint County, Cockermouth.

is this position shaken by any contrary cases; and if so, by what? We are not aware of any cases that controvert the principle acted upon in those above referred to, but of several which have taken a distinction in their decisions perfectly consistent with the principle contended for in the present case. The case of *Abingdon* may be relied on as somewhat contradictory, because, in that case, the committee merely declared the return of Mr. Mayor to be void, and did not seat the petitioner. But allowing, that the fact of Mr. Mayor being sheriff of the county, was notorious and indisputable, does it follow that it was equally clear at that time that he was therefore disqualified? Mr. Simeon says, in page 45, "That it was long unsettled how far a sheriff was or was not capable of being elected, and for what place." Blackstone, however, at the time he wrote his Commentaries, considered the point as settled, for he says, "that sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers; but that sheriffs of one county are eligible to be knights of another;" and cites Hale, (5) Whitelock, (6) and Lord Coke, (7) as his authorities. But however clear this point might have appeared at that time to a lawyer, it shortly afterwards did not appear to be quite so well understood by the public. *Abingdon* was the first case in which this point arose, since decisions on controverted elections have had that weight and certainty, which the improved jurisdiction created by the Grenville act has given to them; but at the same general election, a petition was presented against the return of the sheriff of Hampshire, for the town of Southampton, whose return however, the committee decided to be good; Southampton, being a county of itself, it would therefore appear, that the law at that time was not very clear, or at least not generally understood, and it should be recollected, that it is not a disqualification enacted by statute, but by an inference of law drawn from the wording of the writ, (8) and further, that a sheriff is not, *eo nomine* disqualified. How far a committee of the House of Commons may now consider this point of law, so notoriously decided, as to be imperative on them, not only to avoid the election of a sheriff, if returned for a place within his jurisdiction, but to seat his

(5) Hale of Parl. 114.
(6) Whitelock, 99, 100, 101,
(7) 4 Inst. 48.
(7) Dougl.
(8) Simeon 46.

opponent, it is not for us to say, though the case of *Flint* county leaves little doubt as to what would be the result, if such an experiment was made. We merely contend that this case does not trench upon those decisions which have been founded upon the undisputed and indisputable application of a disqualification created by act of parliament. It may also be urged that in the case of *Colchester*, (9) the committee did not seat Sir R. Smyth, although in that case, the petition alleged that Mr. Potter was not qualified at the time of election; but in that case it appeared in evidence, that Mr. Potter did swear to his qualification, when requested, at the time of election, and was at that time qualified; but the committee avoided his return, because he had not subsequently complied with the standing order (1) of the house, by delivering in the particulars of his qualification to the clerk of the House of Commons. This case, therefore, in circumstance, does not apply. The case of *Malden*, (2) however, may be considered as somewhat varying from the current of authorities relied on, and as more particularly applicable to the case at present under consideration; but whatever colour the loose wording of the decision of the House of Commons in that case may give to such a supposition, we think vanishes, when that case is applied to the decisions which have been made in other cases, either by the house at large, or subsequently by the select committees. This case as cited from the Journals of the House of Commons, both by Mr. Serjeant Blosset (3) and Mr. Serjeant Heywood (4) is as follows; "The qualification of Serjeant Comyns had been openly demanded at the election, and he refused to swear to it. The poll stood for Mr. Serjeant Comyns, 215; Mr. Bramston, 215; Mr. Tuffnell, 168; and Mr. Joliff, 128; the house resolved, "That the house do agree in the resolution of the committee, that John Comyns, Serjeant at Law, having at the late election of members to serve in parliament for the borough of Malden, in the county of Essex, *wilfully refused* to take the oath of qualification as is directed by an act of parliament of the ninth year of the late queen, intituled, an act for securing the freedom of parliament by the further qualifying the members to sit in the House of Commons, though duly required so to do; *and not having at any time before the meeting of the said parliament* taken the

(9) Lader 415.

(1) 21 Nov. 1717, 1 Lud. 441.

(2) 18 Jo. 126.

(3) 1 Peck. App. 99.

(4) Heywood Co. 550.

said oath, his election is thereby void: it was also resolved, by a majority of 171 to 106, that Mr. Tuffnell one of the petitioners, and the candidate who stood next on the poll, was duly elected. Mr. Serjeant Heywood adds, "But whether this resolution was founded on the sitting members disqualification, or the petitioners majority of votes, does not appear."

(4) Co. 550. This observation seems to be introduced by Mr. Serjeant Heywood to account for the second resolution; for if these resolutions are considered, it will be found that, taken as a whole, they are inconsistent with every class of cases decided on the same subject, unless that be granted which does not appear, namely, that the result of the scrutiny was to give Mr. Tuffnell a majority over Serjeant Comyns on the poll. For if the house seated Mr. Tuffnell, because Serjeant Comyns *at the poll wilfully refused* to swear to his qualification, the introduction of the subsequent words of the resolution, namely, "and not having at any time before the meeting of parliament taken the said oath," is surplusage; and if the decision was founded on the *continued neglect* of the Serjeant, it is inconsistent with all the other decisions in like cases, for to seat the petitioning candidate, and nullify the votes of electors, on the ground of disqualification, that disqualification must be notorious and complete at the time of election, otherwise the voters, if in ignorance at that time, are entitled again to have an opportunity of saying who should represent them. A few years afterwards, however, in 1730 (5), the *Weymouth* case occurred, in which it appears, that Mr. Betts, having refused to take the oath of qualification, when required subsequently to the return, but before he took his seat, his return was held void, but the petitioner was not seated; and it is worthy of observation, that one of the arguments then used against the petitioner obtaining the seat was, that the electors having elected Mr. Betts, without notice of his disqualification, ought not to be deprived of an opportunity of making another choice. If the ground of decision in these two cases is consistent, the decision in the *Malden* case must have proceeded on the wilful refusal of Serjeant Comyns to take the oath, when duly requested to do so, at the election, or on the result of a scrutiny. But whether the inaccuracy of the *Malden* case be one of language or one of law, the case is not in itself of

(5) 21 Jo. 574, cit. *Colchester case*, 1 Lud. 29.

that certain character or date, as to be considered at all interfering with the principle of cases subsequently and more solemnly decided. We have noticed it at this length, to show that the language of it is too uncertain to allow any argument to be drawn from it, in opposition to the position we are contending for, and as the only one of uncertain character cited by Mr. Serjeant Blosset. We do not pretend to say, that what is or is not a disqualification of sufficient notoriety to nullify votes may not be further defined, or that every possible case of doubt is removed; all we pretended to show at the outset was, that the current of authorities, as far as they went, had been uniform, and the principle they afforded both precise and useful, and, if we have done that, we are content, and shall now proceed to consider how far the principle we have been endeavouring to establish, applies to the case at present under consideration. The words of the statute of Anne, creating the disqualification, are clear and intelligible; sect. 7, enacts, "If any candidate, &c., shall wilfully refuse, upon reasonable request to be made at the time of the election, or at any time before the day upon which such parliament by the writ of summons is to meet, to take the oath hereby required, then the election and return of such candidate or person shall be void." The only doubt that can arise on this section is what must be deemed a reasonable request; but sect. 5 sets that at rest, which enacts, "that any candidate, &c. shall and is hereby enjoined and required, upon reasonable request to him to be made (at the time of such election, or before the day to be prefixed in the writ of summons for the meeting of parliament,) by any other person who shall stand candidate at such election, or by any two or more persons, having right to vote at such election, take a corporal oath in the form and to the effect following." These two sections clearly show, that this statute had two objects in view:—first, to enact that persons returned to serve in parliament should be possessed of property to a certain amount; and, secondly, to remove any inconvenience that might arise to any other candidate, or the electors, by giving to each of them a right to know, either when a candidate offers, or at any time before the parliament is summoned to meet, whether he is really qualified

to serve the one, or eventually, to oppose the other with success; it being clearly a great object to both parties to be rightly and satisfactorily informed, at the time of election, of a fact which frequently would lie so much in the breast of the party. In further prosecution of this intention is it, that up to the day of summons this inquiry may be made; but although so long a space of time is allowed for inquiry, it cannot, we think, be successfully contended that it would be sufficient, if the request be complied with at any period during that in which inquiry can be made, for it is clear sect. 5 & 7 were introduced for the convenience of parties, that if at the time of nomination the qualification of a candidate should appear disputable, the parties interested may call it in question, if subsequently a doubt should arise, that the parties interested may remove it. But if a candidate, having declined on the request, either of another candidate or of two electors, to take the oath required, be capable of being put in nomination, all the enactments for the convenience of parties contained in sect. 5 & 7 fall to the ground, and are of no avail. These sections do not create the disqualification; sect. 1 does that, and protects the interests of parliament and the public; and if a person does not possess the requisite estate to represent either a town or county, he is incapacitated from serving under that section; or if his qualification be a matter of doubt, it may be put to the test on petition under that section also. This examination of the different clauses of the 9th of Anne therefore shows, that the legislature did not stop content with protecting merely the constitution of parliament, but proceeded to pass several clauses on purpose to prevent and deter unqualified persons from creating unnecessary expense and trouble, either to electors or candidates; so that if a violation of these sections places a party in no worse situation than sect. 1 does, they become nugatory. It is not the object of sect. 5 & 7 to secure the qualification itself, but the notoriety of it, for the satisfaction of every person immediately interested in that fact. Having endeavoured to show that the 9th of Anne intended to give, and has given, to the parties interested a right to know, when a candidate proposes himself as the object of their choice, whether he is duly qualified, as far as

that statute is concerned, to serve them. We would next ask whether it can be contended that the disqualification of Sir W. C. Farlie was not notorious? The disqualification was created by statute, the words of which are clear and intelligible, and of which no one is to be presumed ignorant, and the application of it being made notorious, not only by the notice of his opponent, but by the refusal of the party himself, brings this case quite within the principle of the cases before alluded to, in which votes have been held to have been thrown away. Here is no fact to be inquired into, no question of law to be discussed, the words of the act are positive, and the application of them is indisputable. We, however, are aware that Mr. Serjeant Heywood draws an inference from p. 550. the decision of the House in the case of *Malden*, which materially differs from the construction of sections 5 & 7 of 9 Anne, which we have been endeavouring to establish, and it is with great diffidence that we enter into the lists with his authority. He says, in his comment on the 9th of Anne, "It should seem, however, that the House of Commons has put a liberal construction on the clause requiring the candidate to take this oath, and that the election will not be void, provided he takes it, not at the election upon the requisition there made, but at any time before the meeting of the parliament;" and then cites the case of *Malden* given above; and at the conclusion of the case adds, "But whether this resolution (*i. e.* the 2nd) was founded on the sitting members disqualification, or the petitioner's majority of votes, does not appear." We apprehend it will be conceded that when a candidate lower on the poll than the one returned, succeeds on petition in obtaining the seat, where the election of the sitting member has been declared void, it is either where he has been able, on a scrutiny, to establish a greater number of votes on the poll than his opponent who was returned; or where it can be shown that at the time of election, the candidate returned, was notoriously disqualified; and the electors, in defiance of notice of such disqualification, have persisted in returning him; but that where any disqualification has arisen subsequently to the election of a candidate, or was then in doubt, or where the electors at the time of election were ignorant that the candidate they voted

for was disqualified, that in such cases, although the election may be avoided as to the candidate returned, yet that the voters are not to be thereby precluded from saying, by a majority, who should represent them. If this position be granted, (and the doubt raised by Mr. Serjeant Heywood is strongly in support of it,) then his query does not go far enough to make the determination in *Malden* consistent with the other authorities; because, to have done that, (as Mr. Tuffnell was seated) the query ought to have been, whether the second resolution was founded on the serjeant's refusal at the poll, or on the petitioner's majority of votes; because, if that resolution was founded on the subsequent neglect of Serjeant Comyns to take the oath, then such decision is contrary, not only to justice but to all the decided cases. The wording of the first resolution, "and not having at any time before the meeting of this parliameet taken the said oath," certainly affords ground for Mr. Serjeant Heywood's supposition, that the House of Commons had "put a liberal construction on the clause requiring the candidate to take this oath;" but there is nothing to show that the House came to their second resolution on this liberal construction of the 5th clause of 9 Anne, and if not, then that sentence in the first resolutson may be rejected as surplusage; for to suppose that the house came to that resolution on the ground of the subsequent neglect, and not on that of the first refusal, is to make them decide contrary to the principle on which courts and committees have subsequently decided, that votes are thrown away; and contrary to the authority of the case of *Weymouth*, which occurred only fifteen years afterwards. We have presumed in a former part of this note, to offer some conclusions which we have drawn from the consideration of the different clauses of this act, and if the examination there made is correct, it would appear that the liberal construction supposed by Mr. Serjeant Heywood to have been put by the House of Commons on this statute, is completely at variance, both with the letter and the spirit of that act. It is not the case of *Malden*, but the deductions so respectable an authority has drawn from it, that we consider as materially trenching on the view we have taken of this statute, and the object of its enactments; and if we have called in question an opinion which the wording of a decision of the House of Commons,

prima facie, bears out, we have done it out of respect to that authority which incautiously, perhaps, has given to that decision the chief, if not the only importance to which it is entitled, and trust that we have supported our view of the case, not only by showing that the resolutions taken together are inconsistent with every class of decided cases to which they may be applicable, but further, that if the House did put the liberal construction contended for upon the act on which their resolutions were founded, that then the second resolutions are not only inconsistent with each other, but with the express wording and spirit of the act itself.

Mr. Serjeant Heywood also, in page 551, immediately after his comment on the *Malden case*, writes as follows: "After a candidate has refused to take the oath, the notoriety of such refusal may probably operate as sufficient notice to the electors, of his disqualification, and consequently the votes given for him be thrown away, and the candidate next upon the poll be declared duly elected by the committee. But the sheriff, according to the cases just cited, could not, without danger to himself, reject the votes of these electors who choose to poll for him, or might refuse to return him in case he has the majority." The first part of this opinion is certainly consistent with, and corroborative of, the position we have taken, as to the ultimate effect of such a refusal as occured in the present case; but then the latter part of it is in direct opposition to the principle we have endeavoured to establish, both by analogy from decided cases, and our construction of the 9 of Anne, namely, that when the fact creating the disqualification is notorious, the returning officer is bound to take notice of the application of the law, if required, and refuse a poll. The cases from which Mr. Serjeant Heywood appears to have drawn this conclusion, are those of *Dublin University* and *Radnorshire*, but neither of these cases in their circumstances tally with the case at present under consideration, or trench, as we conceive, upon the argument which we have advanced. It is true, that in both, a claim was made by the petitioner to the seat, on the ground, that the sitting member was notoriously disqualified at the time of election, of which notice had been duly given to the electors, and that in both, the committee decided in favour of the sitting member. But then

in the one case, whether Mr. Knox was disqualified or not, was not notorious nor even certain, but was a question of nicety, and not proceeding from the enactments in any particular act of parliament. The *assertion* that Mr. Knox was disqualified, was the only thing that was notorious; and in the case of *Radnorshire*, where the charge was, that Mr. Wilkins had been guilty of bribery at the then election, that was a fact which could not be notorious, it was matter for further inquiry only, and was incomplete till the facts charged had been investigated and decided to be bribery by a court of competent jurisdiction, and it is in this circumstance that both these cases differ, not only from the present but from the cases before alluded to, (6) but more especially is the case of *Flintshire* an authority to show, that the caution given by Mr. Serjeant Heywood to returning officers, would not apply to the class of cases to which we contend this belongs, because in that case, it is apparent, from the decision of the committee, that they thought the returning-officer should have regarded Sir Thomas Mostyn's want of qualification, by voting his return to be vexatious; and we would also add, that Mr. Serjeant Blosset in his note to the *Radnorshire case*, says, that both Dublin and Radnorshire were decided on the merits and not on the question of *notice*, and states that as a reason for giving to the public his valuable collection of cases in which that point had been brought under consideration.

(6) 2 *Southwark*; 2 *Canterbury*; *Kircudbright*; *Fife* and *Flint* Co.

It however may and has been argued, that the words "such election" must be construed to mean, any time before the poll has closed, as it has been decided in several cases, but particularly in that of Bristol, that the election is the result of the poll and not of the nomination, and that if such be the case, under the words "such election," a candidate, when requested to comply with the 5th section of the 9th of Anne, would have all the time allowed him till the poll closed, to take the oath, and the case (7) of Mr. Cruger, Bristol, 1786, is cited as an authority to show, that it is not necessary a candidate should be qualified when the poll commences, it is sufficient if he be so at its close; because, in that case, the objection taken was, that Mr. Cruger's qualification was completed during the poll, and that objection was overruled. Mr. Simeon, in commenting upon this case, adds, "The earliest

(7) Simeon p. 51.

period at which the stat. 9 Anne requires the party chosen to be duly qualified, is at the election, but there being no election till the poll is finished, the decision seems clearly right so far as it depends upon the *time*." In this we agree; but the decision in this case is only the necessary consequence of the decision in the prior case of *Bristol*, when Mr. Burke was held to be duly elected, though nominated on the second day of the poll; because if it be not necessary to be nominated, how can it be necessary to be qualified at the commencement of the poll. But neither of these cases in the least interfere with the principle contended for in the present instance, because it rests upon this point, that if at the time of nomination there be no more candidates than vacancies, the returning officer is bound to return those who do offer without delay (8). Then decided cases say, that where a person is notoriously disqualified, and notice is given of such disqualification to the returning officer and the electors, such person is no longer to be considered as a candidate. There was no time, therefore, in this case for the qualification to be acquired, as the poll ought never to have been opened. The oath may be requested at any time from the election to the meeting of parliament. But the candidate is to take it upon reasonable request, that is, when requested, either at the time of election, or before the day to be prefixed in the writ of summons for the meeting of the parliament. The time when the demand may be made is optional, but that demand is to be complied with, when made; if it were otherwise, there would be an end of any utility to be derived from the power given to electors and candidates by sect. 5, because independently of that section, the parties interested may petition against the return of any candidate, on the ground that he is not possessed of a sufficient qualification, without first demanding the oath to be taken; and if a disclaimer of qualification, on the part of a candidate before a poll commences, does not justify a returning officer, in considering such candidate as disqualified, and therefore in refusing a poll, sect. 5 and 7 of that act are of no avail. We cannot but consider the resolutions which the committee came to on the present occasion as, in effect, strongly corroborative of the opinion we have ventured to advance in this note; for although the first resolution does not

(8) *Nottingham*, 1 Peck. 77.

express the grounds upon which the committee determined that Sir W. C. Fairlie was disqualified, (the resolution being merely that Sir W. C. Fairlie, not being qualified, is not duly elected,) yet we contend, that this resolution, coupled with the second, resolving John Harcourt, esq. to be duly elected, shows that the committee must have considered Sir W. C. Fairlie disqualified and ineligible at the time of nomination, because if that decision was founded upon the merits of either of those qualifications subsequently given in and sworn to by Sir W. C. Fairlie, we submit, that the committee could not have arrived at their second resolution, seating Mr. Harcourt, consistently with prior decisions, or without infringing the rights of the electors, as Sir W. C. Fairlie still retained his majority of votes on the poll undisturbed. We also conceive, that if Sir W. C. Fairlie had given in either of the qualifications he subsequently swore to when first requested to take the oath, it would have been sufficient to render it a void election at least; for even allowing those qualifications eventually to turn out defective, still there would have been a *prima facie* qualification relied on, which, if insufficient, must have been declared so by a competent tribunal, and of the sufficiency of which the returning officer was not to judge; but the case is quite altered where the candidate, instead of making out a *prima facie* case of qualification, declares his want of one, by declining to swear to a qualification when properly requested so to do, and although Sir W. C. Fairlie, when first requested to take the oath, tendered a qualification which he was willing to swear to, that will not alter the case, because the qualification then put in by Sir W. C. Fairlie, *on the face of it*, was not such as is required by the 9th of Anne, and which being pointed out to the returning-officer, he was bound to take notice of. For this last proposition, the case of *Fife* is an authority; for in that case, it was objected by Mr. Henderson, at the time of election, that General Skene held the offices of baggage-master of the forces, and inspector of the roads in Scotland, one or both of which were new offices of profit, created subsequently to 26th October 1705, and consequently that General Skene was not eligible. General Skene admitted that he held the offices in question, but denied that the disqualification created by

(9) 1 Lud. 455, 37 Jo. 500, 9 Dec. 1779; Ib. 560-61, 7 Feb. 1780.

the 9th of Anne attached upon either of them. General Skene was returned, and on petition, the committee were of opinion, that the novel creation of one of the offices was notorious, and that it was within the statute of Anne; and held that the electors who voted for General Skene, the sitting member, had thrown away their votes, and adjudged the seat to the petitioner, who had the minority on the poll. (1) 6 Anne, 27.

CASE II.

THE BOROUGH OF EVESHAM, IN THE COUNTY OF WORCESTER.

The Committee was chosen on the 11th of February 1819, and consisted of the following Members:

Right hon. Wm. Sturges Bourne, (*Chairman.*)
Albany Saville, Esq.
Coningsby Waldo Sibthorpe, Esq.
Wm. Henry Ashurst, Esq.
John Charles Ramsden, Esq.
Walter Burrell, Esq.
Archibald Campbell, Esq.
Robert Greenhill Russell, Esq.
Edmond Wodehouse, Esq.
Lord Arthur Hill,
Sir John Osborne, Bart.
Sir John Riddell, Bart.
Lord Viscount Pollington,
Robert Grant, Esq. for the Petitioners.
Granville Venables Vernon, Esq. for the Sitting Member.

Nominees.

Petitioners. 1. Sir Charles Cockerell, Bart.
2. Electors.

Sitting Members. Humphrey Howarth, Esq.; Wm. Edward Rouse Boughton, Esq.

Counsel for the petitioning Candidate: Mr. Warren and Mr. Erskine.

Counsel for the Electors: Mr. Gazelee and Mr. Erskine.

Counsel for Mr. Boughton, the Sitting Member petitioned against: Mr. Serjeant Pell, Mr. Serjeant Hullock, and Mr. Edward Lawes.

Petition of Sir C. Cockerell.

THE petition of Sir Charles Cockerell stated, that William Edward Rouse Boughton, esq., one of the sitting members, had procured, and the returning-officer had allowed, many persons to poll for the said William Edward Rouse Boughton, at the last election for *Evesham*, who had no legal votes, and no right or title

whatsoever to vote at such election. That many persons who had a good right to vote, and who had tendered for the petitioner, had been rejected; that by these means, the said William Edward Rouse Boughton had obtained a colourable majority, and procured himself to be returned, to the prejudice of the petitioner, who had a majority of legal votes, and also to the prejudice of the legal electors of the borough.

This petition likewise contained a charge of bribery and treating, in support of which, no evidence was offered.

The petition of the electors was to the same effect as that of Sir Charles Cockerell, with the the exception of the charge of bribery. Of the electors.

The numbers on the poll were as follows: Numbers on the poll.

	Cockerell:	Boughton:
Freemen	236	178
Incohate Rights	2	20
Paymasters	103	161
	341	359

Majority in favour of the sitting member, eighteen.

List of objections against, Objected votes.

	Cockerell:	Boughton:
Paymasters	2	161
Rights to freedom	—	20
Freemen	182	27
Rejected votes to be supported	7	14
	191	222

Majority of objections on behalf of petitioner 31
Deduct, majority for the sitting member - 18
Clear majority on the list of objected votes for Sir C. Cockerell - - - 13

Last determination, 1669.

The last determination of the House of Commons was, "That the common burgesses had voices in elections, and that the select election by the mayor, aldermen, and chief burgesses, was not good."

The right of election was stated by the petitioners to be "in the mayor, aldermen, capital and other burgesses members of the corporation."

By the sitting member to be, "in the mayor, aldermen, and freemen of the borough, and in the inhabitants of the borough paying scot and lot."

The principal question in this case, and that which the committee resolved should be proceeded with in the first instance was, whether under the term "common burgesses," in the last determination of the House of Commons, inhabitants of the borough paying scot and lot had a right to vote, or whether the term, "common burgesses," there only meant such members of the corporation as did not come under the description of "the mayor, aldermen, and chief burgesses."

Evidence,

The evidence offered in support of the statement given in by the petitioners, consisted,

Charter 1 Jac. 1, 1603.

First, Of a charter, bearing date 1st of Jac. I, 1603, which reciting that the borough of Evesham was an ancient borough; and that certain charters and patents heretofore granted had been lost, granted, *inter alia*,

Name by which incorporated.

That the borough of Evesham should be a free borough of itself, and that the bailiffs, aldermen, and burgesses of the said borough, should be incorporated and be one body corporate, by the name of the bailiffs, aldermen, and burgesses of the borough of Evesham; and that they should have a common seal:

Twelve aldermen, twelve capital burgesses, to be of a common council, out of which two bailiffs to be chosen annually.

That there should be twelve burgesses chosen, who should be called aldermen, and twelve more who should be called capital burgesses:

That the twelve aldermen, and twelve capital burgesses, should be of a common council, out of which

two bailiffs should be chosen annually; and that the residue of the common council should assist them in the affairs of the borough:

That the bailiffs, aldermen, and capital burgesses, or the major part of them, (of which the high bailiff should be one,) should have the power of making laws and ordinances "for the good rule and government of the said borough, and of all and singular the officers, ministers, artificers, inhabitants, and residents of the said borough:" Power of bailiffs, &c. to make laws, &c.

That there should be a high-steward and town-clerk of the said borough: High steward and town clerk.

"That there might and should be in the said borough of Evesham, two burgesses of the parliament of the King and his successors; and that the aforesaid bailiffs, aldermen, and burgesses, and their successors, upon the King's writ, directed to them, for the election of burgesses of the parliament, should have power, authority, and facility to elect and nominate two discreet and honest persons to be burgesses in the King's parliament for the same borough; and the same burgesses, so elected, to send to the King's parliament, at the costs and charges of the said bailiffs, aldermen, and burgesses of the borough aforesaid, and their successors for the time being, wheresoever the same should be then holden, in the same manner and form as was used and accustomed in the other boroughs of his Majesty's kingdom of England:" Power to send two members to parliament.

And, further, reserves to the bailiffs, aldermen, and burgesses, of the said borough, all liberties, franchises or immunities which they had before used or enjoyed.

Secondly,—A charter, bearing date the 3d of April 1605, 3 Jac. I, reciting, that the borough of Evesham was an ancient borough, and enjoyed many liberties, &c., by reason of divers charters, &c.; and that the town of Bengeworth adjoined and lay near the said borough of Evesham; and because divers offences, 2d Charter, 3 Jac. 1, 3 April 1605.

riots, &c. had been committed in the said town, for want of proper government therein, to the great damage of the inhabitants of the said town, and also of the inhabitants of the said borough; "for which reasons, the King's subjects, as well the bailiffs, aldermen, and burgesses of the said borough of Evesham, as the tenants, residents, and inhabitants of the said town of Bengeworth, had jointly besought the Crown, by letters patent, to make, renew, and create, as well the bailiffs, aldermen, and burgesses of the borough of Evesham aforesaid, as the tenants, residents, and inhabitants of the town of Bengeworth, into one body corporate and politic, by the name of the mayor, aldermen, and burgesses of the borough of Evesham, in the county of Worcester;" whereby it is granted, that—

Borough of Evesham and town of Bengeworth united into one body corporate.

The said borough of Evesham, and town of Bengeworth, should thenceforth, and for ever, be one free and undivided borough of itself; and, that, as well the said bailiffs, aldermen, and burgesses of the said borough of Evesham, as the said tenants, residents, and inhabitants of the said town of Bengeworth, should thenceforth be one body corporate and politic, by the name of mayor, aldermen, and burgesses of the borough of Evesham in the county of Worcester:

Seven burgesses to be chosen aldermen.

That there should be seven burgesses chosen, who should be called aldermen of the said borough:

Twelve burgesses to be chosen and named capital burgesses.

That there should be twelve burgesses chosen, who should be named capital burgesses of the said borough:

A recorder and chamberlain.

That there should be a recorder and a chamberlain:

Aldermen, &c. common council, out of which a mayor to be elected.

That the aldermen, capital burgesses, recorder, and chamberlain, should be of the common council of the said borough; out of which body, one should from time to time be chosen mayor of the said borough:

24 burgesses to be assistants.

That there should be twenty-four burgesses chosen, who should be called assistants:

That the aldermen and capital burgesses, the recorder, chamberlain, and assistants, should assist the mayor in the affairs of the borough: Aldermen, &c. to assist the mayor.

That the mayor, aldermen, recorder, chamberlain, and capital burgesses, or the major part of them, (the mayor being one,) should be able to make laws, &c., "for the good rule and government of the said borough, and all and singular the officers, ministers, artisans, inhabitants, and residents whatsoever of the said borough for the time being:" Power to make laws, &c. in the mayor, &c.

That there should be a high steward: High steward.

"That, from thenceforth, for ever, there were and should be within the said borough of Evesham, two burgesses of parliament; and that the said mayor, aldermen, and burgesses of the borough aforesaid, and their successor, upon any writ of election to him directed, might and should have power, authority, and faculty to elect and nominate two discreet and honest men to be burgesses of parliament for the said borough; and the same burgesses so elected, to send to parliament at the costs and charges of the said mayor, aldermen, and burgesses of the borough aforesaid, and their successors for the time being." To send two burgesses to parliament.

And further, "that the mayor, aldermen, and capital burgesses of the said borough for the time being, or the major part of them, (of whom the mayor for the time being should be one) might and should have full power and faculty, from time to time, to elect, nominate, assign, and constitute, such and so many persons, inhabiting and residing, as well without the said borough, as within the said borough, the suburbs, limits, or precincts thereof, to be burgesses of the said borough, as to the said mayor, aldermen, and capital burgesses, or the major part of them, should seem to be most useful for the public advantage of the said borough, in the same manner and form, and under such corporal Power to elect burgesses.

oath*, to be taken by every of the said burgesses so to be elected and assigned, as within the said borough the burgesses of the said borough had been heretofore accustomed to take:—And that such burgesses of the said borough, and every of them, from thenceforth for ever, should and might be able fully and peaceably to possess, and enjoy, and use for ever, all liberties, privileges, franchises, and immunities, theretofore given and granted to the bailiffs, aldermen, and burgesses, of the said borough of Evesham, or by whatsoever other name or names they had been theretofore incorporated."

Charters. Thirdly. Returns for the borough of Evesham from 1604 to 1669:—

Date of the Indentures:	Parties making the Returns, &c.
1 Jac. 1, 15 March.	The bailiff and others of Evesham. Under the corporation seal, but without any signature.
3 Jac. 1, 31 October.	Mayor, aldermen, and capital burgesses. Signed by the mayor and others.

Oath. * You shall swear that you shall be a true liege man, and true faith bear to our Sovereign Lord the King, his heirs and lawful successors, and to your power shall aid and assist the mayor and other officers of this town for the time being, and to them shall be obedient and attendant, concerning such things as they, or any of them, shall lawfully and reasonably will or command you to do; you shall also well and truly observe, perform, fulfil, and keep all such orders and rules as are and shall be made and established by the common council of this town, for the good government thereof; in all things to you appertaining, you shall yield and be contributory to and with the corporation of this town, so far forth as you ought or shall be chargeable to do; and you shall not, by colour of your freedom, bear out or cover under you, any foreign person or stranger, but according to the best of your skill, with cunning and power, you shall uphold and maintain all the liberties, franchises, good customs, and usages of this town, and corporation. So help you God.

Date of the Indentures:	Parties making the Returns, &c.:
7 Jac. 1, 26 February.	Mayor, four aldermen, and ten capital burgesses, by name. Signed by the mayor and fourteen persons.
18 Jac. 1, 15 Decem.	Mayor, aldermen, and burgesses. Signed by the mayor and aldermen with their additions, and thirteen others without additions. Corporation seal.
19 Jac. 1, 21 Novem.	Mayor, aldermen, common council, and burgesses. Signed by the mayor and five persons. Common seal.
21 Jac. 1, 4 February.	Mayor, aldermen, and burgesses. No signature. Corporation seal.
1 Car. 1, 27 April.	Idem. Idem.
1 Car. 1, 1 February.	Idem. Idem.
3 Car. 1, 27 February.	Idem. Idem.
15 Car. 1, 4 April.	Idem. Idem.
16 Car. 1, 16 October.	Mayor, aldermen, and burgesses, by name. Signed Robert Martin, no addition of mayor to his name. Corporation seal.

Date of the Indentures:	Parties making the Returns, &c.:
Commonwealth, 4 Apr. 1669.	Idem. Under corporation seal and six others. Signed by the mayor, by name with his addition, and eleven others without addition.
13 Car. 2, 11 April.	Thomas Yarnard, mayor; Robert Lord Tracy; Theophilus Andrews, esq. recorder; Thomas Watson and Thomas Milner, esqs. aldermen and justices of the peace of the borough; William Bartlett, Thomas Handy, and Francis Smart, aldermen; Thomas Jones, and burgesses. Signed by the mayor, with his addition, Lord Tracy and the others named in the indenture, without addition. Corporation seal.
21 Car. 2, 29 Oct. 1669.	Edward Field, gent. mayor; Theophilus Andrews, esq. recorder; Giles Keighley, esq. and Thos. Watson, gent. aldermen; and seven *burgesses by name. Signed by the mayor, with his addition, and the names of the other persons named in the indenture, without addition. Corporation seal.

* Before the word burgesses, in the parties to the indenture, there appeared to be an erasure. Probably the word *capitales* was struck out by the returning-officer, or the clerk of the crown, to amend the return according to the decision of the House, on the

The returns from 1 Jac. I, down to 1660, were produced by Mr. Davis from the Rolls Chapel. The two last by Mr. Crocker, from the Petty Bag Office. Mr. John Bailey, a clerk in the Record Office at the Tower, proved that search had been made, and that no returns could be found prior to 1604.

From 1 Ed. 6, to the Restoration, the Returns are kept at the Rolls Chapel, after that time in the Petty Bag Office. *Vide* note, 1 Peck. 119.

Fourthly,—The report from the committee of elections in 1669, and the determination of the House thereon, was read from the Journals as follows:—

Last determination, 22 Nov. 1669.

"Sir Job Charlton reports from the committee of elections, the state of the case concerning the election for the borough of Evesham, upon the petition of Sir James Rushout, and the questions arising thereupon being three; namely,

First,—Whether the mayor, aldermen, and capital burgesses only, or the burgesses at large, had the right of election?

Secondly,—Whether the election were good or bad?

Thirdly,—Who had the majority of voices?

That the committee were of opinion, that the common burgesses had voices in elections, and that the

petition of Sir James Rushout against this return. The erasure was about two inches long, more than sufficient to contain the word *capitales*. [Evidence of Francis Crocker, clerk in Petty-Bag Office.] At the date of this return, it was customary that the returning-officer should be ordered to attend the House, together with the clerk of the crown, when the return was to be amended, and that the amendment should be made by the returning-officer; and then if the returning-officer neglected to attend, the return was amended by the clerk of the crown. It was not till April 12, 1690, that the House resolved, "That after a return made into the crown-office, of members to serve in Parliament, the same shall not be altered by the sheriff, or the clerk of the crown, or any other, but by this House." Now when there is occasion to amend a return, the clerk of the crown is ordered to attend with it, and amends it in the House, by erasing the names of the persons whom the House have determined not to be duly elected, and inserting the names of those who ought to have been returned. *Vide* 1 Doug. p. 90.

election by mayor, aldermen, and chief burgesses, was not good.

That the election was not void; that Sir James Rushout had a majority of voices, and was duly elected. The question being put, to agree with the committee, that the right of election is in the common burgesses, and that the select election by the mayor, aldermen, and chief burgesses, was not good.

The house was divided, the noes went out.

Tellers, Sir James Sydenham, and Sir Richard Everard; for the ayes, 132.

Sir Joseph Talbot, and Colonel Whitby: for the noes; 120.

And so it was resolved in the affirmative.

The matter being debated, whether the denial of the poll, did avoid the election?

The question being put, to agree with the committee, that the election is not void.

The house was divided, the noes went ou

Tellers, Mr. Tufton, and Mr. Boscawen. on the ayes, 117.

Sir Charles Wheeler, and Mr. Wells; for the noes, 158.

And so it passed in the negative."

Argument, for the petitioner.

On this point, (namely, what was the meaning of the word burgess, in the determination of 1669) the counsel for petitioner, argued as follows:—

Meaning of the word burgess.

It is not contended, that the word burgess, necessarily implies a member of a corporation; that word having in several cases, been decided to mean both corporators and inhabitants, or either; but that the right interpretation of the sense in which it was used, can only be ascertained by attending to the evidence and circumstances belonging to each particular case. If there is neither charter nor last determination, recourse must be had to usage: if there is either charter or last determination, and any doubt arises upon the wording, then to

contemporaneous usage, to explain how the matter was then understood.

In the case of *Liskeard*,* this point was argued at great length, not only before a committee (1), but afterwards before a committee of appeal (2), where the decision of the original committee was confirmed; and in that case it was held, that the word burgess was confined to members of the select body. In that case, the returns were made in some instances, by the mayor and burgesses, signed with their seals; and in others, by the mayor, burgesses, and inhabitants. In the *Malmsbury case* (3), the petitioner stated the right of voting to be in the aldermen, capital burgesses, assistants, land-owners, and commoners of the borough. The sitting member alleged, that it was in the aldermen and twelve capital burgesses of the borough only. The committee decided the right of election to be as stated by the sitting member. In *Helstone* (4), the word commonalty was held to mean freemen only; in the cases of *Poole* (5), *Cardigan* (6), *Derby* (7), and *Lyme* (8), the term burgess, was confined to freemen only. On the other hand, there is the *Tewkesbury case* (9), where the word burgess was held to include freeholders; and in that of *Chippenham* (10), inhabitants paying scot and lot. From the collection made by Mr. Simeon (11), in his Appendix of the foundation of the right of voting in different boroughs, it appears, that there are eighty-six boroughs, where the terms were confined to the select body; and forty, the other

(1) Peckwell 110.
(2) 2 Peckwell 275.
(3) 3 Peckwell 397.
(4) 2 Doug. 1.
(5) Ib. 225.
(6) 3 Doug. 171.
(7) Ib. 285.
(8) 2 Lud. 1.
(9) 1 Peck. 146.
(10) Ib. 262.
(11) 12 Sim. 16, App. 53.

* There was no determination of the House of Commons respecting the right of voting in this borough. The right of election was stated by the petitioners to be in the inhabitants paying, or liable to pay, scot and lot;—by the sitting member, to be in the mayor and burgesses of the borough. The committee resolved, the right of election to be as stated by the sitting members.

† The sitting members stated, the right to be in the burgesses of the borough exclusively; the petitioners, in the inhabitants and householders within the borough, paying scot and bearing lot. The committee decided, that the sitting members were duly elected.

way. This is sufficient to show, that the explanation to be given to the word burgess, when doubtful, must depend upon the circumstances of the particular case. In the present instance, the situation of the borough, and the usage antecedent to, and near the date of, the decision of the House of Commons in 1669, must be had recourse to. Contemporaneous usage being evidence to show, in what sense the word burgess was there used.

Usage.

That as no evidence can be found of an earlier date than the charter of the 1st of Jac. I, (1) reference must be had to that document, to see what the situation of the borough then was. That charter recites, "that the borough of Evesham, was an ancient borough, and that the burgesses of that borough, sometimes by the name of the bailiffs, aldermen, and burgesses, and sometimes by other names, had enjoyed certain privileges and immunities," and then incorporates them by the name of the bailiffs, aldermen, and burgesses. That charter likewise gives a power to elect members of parliament, but to whom? to the bailiffs, aldermen, and burgesses, and their successors. The power is not given to the burgesses alone, but to the corporate body. There the term successor means nothing, it is only a corporate term. The king and his successors. A bishop and his successors. Then comes the charter of the third of James the first (2), which incorporates the town of Bengeworth with the borough of Evesham, under the style of the mayor, aldermen, and burgesses of the borough of Evesham. Who is empowered under this charter, to elect members of parliament? The mayor, aldermen, and burgesses. There is also, under this charter, a power given to the mayor, aldermen, and capital burgesses, from time to time, to elect persons burgesses, whether inhabitants of the borough or not; and when elected, they are to take an oath; and when being so elected, they have taken the oath prescribed, they are to enjoy all the immunities and privi-

(1) Ante, p. 28.

(2) Ante, p. 29.

leges theretofore granted to the bailiffs, aldermen, and burgesses of the said borough. What are their immunities and privileges? To send members to parliament is one. Who is to enjoy it? Persons elected into and sworn of the corporation. There is also a power given to convert inhabitants into burgesses. If the inhabitants at that time had been known by the name of burgesses, the charter would have said so, and the power given, would have been, not to make inhabitants burgesses, but to elect burgesses of the corporation, from the burgesses of the borough. The inference clearly is, that no one was considered at that time a burgess, who was not a member of the corporation.

Returns.

Then there are a series of returns (3), which have been produced in evidence, from the date of the first charter, down to the decision of the House of Commons in 1669, all made by the corporation, in their name, under their seal, and in their name alone, or in the name of persons who filled different corporate offices; and that, without a single instance, in which it can be shown, that any inhabitant paying scot and lot, not a member of the corporation, has taken any part. It may be said, this was neglect on their part only, no mention being made of them, one way or the other. If it has been neglect, they must suffer for their negligence; but the natural inference is, that such persons had no right to take a part.

(3) Ante, p. 32.

Last decision.

The decision of the House in 1669, comes next to be considered: and how does this evidence apply to the term burgess, as there used?—The committee found that the common burgesses had voices in elections, and that the election by the mayor, aldermen, and chief burgesses was not good; and the House resolved, on the question being put, that the right of election was in the common burgesses, and that the select election by the mayor, aldermen, and chief burgesses, was not good. The return in that instance, was made by the mayor, recorder, two aldermen, and seven burgesses by name.

The question clearly was, between the two bodies of the corporation, and not between the corporation and the inhabitants of the town, for though nothing appears at present before the word *burgenses*, after the seven signatures; yet there is an erasure before it, large enough to have contained the word *capitales*; which word was probably struck out by the clerk of the crown (4), to amend the return agreeably to the determination of the House; but whether that was the case or not, the words of that resolution sufficiently explain who were the parties before the House. But inhabitants paying scot and lot were then known as a class of voters distinct from burgesses; and the right of voting, being at that time in question, if the committee had considered that such persons had a right to vote, they would have named them in their resolution, and not have left their right to be deduced as matter of inference. What decision then can the committee come to, coupling the resolutions of 1669 with the returns, and the charters given in evidence; but that the words, common burgesses, as used in that decision, must be applicable to members of the corporation only?

(4) Vide note, ante p. 34.

The petition in the present case, has arisen from the claim made by the inhabitants of the borough paying scot and lot (there called paymasters) to a right to vote as common burgesses, under the determination of 1669. In 1808 there was likewise a petition, grounded upon a similar claim made by the freeholders; in that case, the same evidence was adduced as in the present, and the question was argued at great length. The committee, however, decided against the right of voting being in the freeholders.

Argument for sitting member.

For the sitting member it was argued, that no conclusion must be drawn from the use of the word burgess, as exclusive of the right of the inhabitants to vote, since no one could contend that the word burgess, either in its general acceptation or original meaning, is synoni-

mous with freeman, or that it has been so used in the earlier periods of our history. A burgess is the inhabitant of a borough town; a citizen, of a city; which interpretation is so well understood that it is unnecessary to refer to Bradey, or such authorities. Then a burgess, *ex vi termini*, being nothing more than the inhabitant of a borough; what is a borough? A town of principal note, which enjoys particular privileges. Lord Coke says (5), some boroughs are incorporate, and some not. It follows, therefore, that the word burgess cannot necessarily mean freeman. Then it has been decided, in the case of *Duncannon* (6), that the inhabitants of a place, *qua* inhabitants, are capable of being incorporated. How is the word understood in the language of parliament?—The writ to the sheriff, on a general election, is as follows: "We command two knights, &c.; of a county, &c.; and of the university of Oxford, two burgesses, &c.; of every city, two citizens, &c. and of every borough, two burgesses, &c." The term burgess as there applied to Oxford, cannot mean freeman, as being a freeman has nothing to do either with returning or being returned member for a university. The same observation applies to the representatives of boroughs; because, whether corporate or not, it is not a necessary qualification that their members should be free. The 35 of Henry VIII, which directs the inhabitants of the different boroughs in Wales to contribute to the payment of the wages of their representatives, enacts that the burgesses thereof should send members, &c. some of the towns enumerated being incorporated, and some not. In ancient charters, the word burgess generally means inhabitants (7). What is the interpretation that committees, and the House of Commons, have given to the word burgess? In the case of *Abingdon* (8), the House decided, that the word burgesses in their charter, extended to the inhabitants. In that of *Aldborough* (9), the question was, whether the word burgesses, in the

(5) 1 Inst. 188.

(6) Hob. 15.

(7) 2 Doug. 1 Fras. 50.

(8) 8 Jour. 42, May 23, 1660.

(9) 10 Jou. 418, May 17, 1690.

returns, meant burgage-tenants, or the inhabitants paying scot and lot; and it was decided in favour of the latter. So also, in the case of *St. Ives* (1), the right of election was held to be in the inhabitants paying scot and lot. In the cases of *Seaford* (2) and *Peterborough* (3), the right was held to be in the inhabitants householders. In *Poole* (4), *Lyme* (5), and *Cardigan* (6), it has been interpreted corporators. In that of *Pomfret* (7), it was held to include burgage-tenants.

(1) Oct. 24, 1702.

(2) 3 Doug. 19.

(3) Ib. 61.

(7) 1 Fras. 191.

If the word burgess does not necessarily mean freeman, the argument attempted to be raised on the wording of the charter of the 1st Jac. I, falls to the ground. That charter recites, that the borough of Evesham was an ancient and populous borough, and incorporates the bailiffs, aldermen, and burgesses of the borough into one body corporate, by the name of the "bailiffs, aldermen, and burgess of the borough of Evesham:" there is nothing in this charter which shows, that to be a burgess it was necessary to be a corporator. But, it is said, the charter of the 3d Jac. I, gives a power to the corporate body to choose burgesses. The object of that charter was to annex the town of Bengeworth to the borough of Evesham, and for that purpose, incorporates the two together, under a new name; and a power is given to the mayor, aldermen, and capital burgesses, to choose burgesses, persons residing without as well as within the borough. That charter gives the power of electing strangers burgesses, on which point the first charter is silent. If it had been necessary for an inhabitant to be elected a burgess by the corporate body, the 1st charter would have contained some provision to that effect, for the support and continuance of the corporate body; but if the word burgess then meant inhabitant, which is the original and usual acceptation of the word, such a clause was unnecessary. If a word of doubtful meaning occurs in a charter, the principle is to construe it in

Charter, 1 Jac. 1.

Charter, 3 Jac. 1.

extension rather than in restriction of the elective franchise. What then is the language of the returns? The first return is made,—1st, between ——, then Robert Allen and others, bailiffs of the borough of Evesham; then there is another, ——, followed by the name of Gardner, gent. Philip Anderson, gent. John Powell, gent.; another, ——, and several others, gents., with these words, *et alii de Evesham*. Who can these *alii* be, but the inhabitants? Would the freemen be called *alii?* The presumption ought to be in favour of the right of voting; here is nothing to control that plain interpretation of the word *alii*, it therefore is strong evidence to show, that the inhabitants did interfere, and did vote prior to the decision of 1669. But then there is the corporate seal; that, however, is not affixed to all the returns given in evidence, and if it were, it would not show, *ex necessitate*, that it was exclusively a corporate act, and that inhabitants, not members of the corporation, had no right to vote. Bridgewater is a corporation, and the corporate seal is there used, though the right of voting is in the inhabitants. The last determination of the House of Commons decides nothing on this subject. Who were at that time the parties litigant? The capital burgesses, and the body at large. Whether freemen or inhabitants, it does not appear; but the contest was between the select body and the body at large. The House merely resolved, that the common burgesses had voices; they did not even determine, that the select body had the right of voting at all. If the select body have the right, it is because they are members of the body at large, for that such had voices, was all the committee of 1669 decided. Nothing appears, either from the charters, returns, or usage, to confine the interpretation of the word burgess, in this case, to mean members of the corporation *only*; the word, therefore, must be taken in its usual and original acceptation, and be held to comprehend the inhabitants, whether corporators or not.

The returns.

Bridgewater.

Last determination.

Resolution. The committee resolved, "that inhabitants paying scot and lot are not entitled to vote under the resolution of 1669."

Two objections were taken, on behalf of the petitioner, to the course pursued by the counsel for the sitting member:—First, that no evidence could be received to contradict or explain the determination of 1669, there being no ambiguity on the face of it:—And secondly, that no evidence of a date subsequent to 1669 was admissible, to show in what sense the words, common burgesses, were there used.

Ambiguity, argument for the petitioner. The counsel for the sitting member having offered a return in evidence, dated 1669, but subsequent to the decision of the House, the counsel, on the part of the petitioner, objected to its being received in evidence; and argued, that as there was a last determination in this case, which by statute had been made final and conclusive, no evidence could be received to contradict it. That the 2d G. II, enacts (8) "that such votes shall be deemed legal, which have been so declared by the last determination in the House of Commons, which last determination, concerning any county, city, &c., shall be final and conclusive to all intents and purposes whatsoever, any usage to the contrary notwithstanding." That there was also a resolution of the House, precluding counsel from offering any evidence that should tend to call in question, or vary such determination, consequently that no evidence could be received in this case, unless it could be shown that there was some ambiguity on the face of the last determination. That, in that determination, there was no ambiguity; for, although the word burgess might have different meanings, yet, in giving interpretations to words, we must, as Lord Kenyon says, look to the four corners of the deed, so in this case, looking to the whole of the decision, and the proceedings on the Journals, it appeared clearly to have been a corporate question; no doubt, therefore, could arise, in

(8) Geo. 2, c. 24, s. 4.

what sense the word burgess was there used. That the question was not, whether the right was in the corporation, but in what part of it.—How do the courts of law construe deeds or wills? If there is an express term used, and there is any thing to satisfy it, any thing on which it can attach, evidence will not be received to give further explanation, as in the case of *Doe* and *Chichester* (9), where the Court of Common Pleas decided, that under a devise of "my Ashton estate," evidence could not be received to show what the testator considered as his Ashton estate, but held that no more passed under the devise than was contained in the manor of that name, that being sufficient to satisfy the terms of the devise. In this case, the decision of the House says, that the common burgesses have voices, these are common burgesses, and they satisfy the terms of the decision.

(9) *Doe v. Chichester*, 3 Taunt. 147.

For the sitting member, it was argued, that unless the committee were prepared to decide, that there was one fixed, certain, and determinate sense in which the word burgess was always used; they must resolve that there was such an ambiguity in the decision of 1669 as will let in evidence to explain in what sense the word burgess is there used. But there is no fixed and determinate sense in which that word is used. On the contrary, there are many legal decisions, giving different imports to it, according to the varying circumstances of different cases. Can the committee, from any certain interpretation or decided cases, say, that the word burgess must mean corporators, or freeholders, or inhabitants resident or paying scot and lot, or burgage tenants? They might as well decide one as the other, for there are cases in which all these different imports have been affixed to the word burgess. But supposing there is no ambiguity on the face of the determination, evidence may be received to show that there is in fact, a latent ambiguity. Suppose a devise to Thomas and

Argument for sitting member.

his son A., there is no ambiguity on the face of the devise; but still evidence would be received to raise one, by showing that Thomas had two sons of the same name, and then to explain which was the one meant by the testator. The following case occurred on the last circuit: A man granted and conveyed all his coal mines in the possession of A. B. & C. There was no ambiguity there; but at the time the grant was made there were no such persons as A. B. & C.; evidence was called to show, the words were ambiguous, though it was objected that could not be done, on the ground, that the words in the deed were plain and intelligible.

Resolution. The committee determined, "that the counsel for the sitting member were at liberty to adduce evidence, to show ambiguity in the last resolution of the House."

No evidence was offered on behalf of the sitting member of a date either anterior to, or contemporaneous with, the decision of 1669; but it was proposed to adduce both parol and documentary evidence of a subsequent date, to show many instances in which inhabitants paying scot and lot, not members of the corporation, had exercised the elective franchise. A return, dated 7th December 1669, was first offered in evidence, which it was objected could not be received, it being dated subsequently to the decision; and, on this objection, the question, whether evidence, of a date subsequent to the decision of 1669, could be received, to explain an ambiguity in the wording of that decision, was discussed.

Argument for petitioner. For the petitioner, it was argued, that to show ambiguity in the resolution of 1669, something of the same date must be given in evidence;—that it was by contemporaneous evidence alone that any ambiguity could either be raised or cleared up;—that the committee must put themselves, as near as possible, into the same situation as the committee of 1669, before they could give any explanation to the decision of that com-

mittee;—that the statute of George II, (1), enacts, that the last determination of the House is to be final, any usage to the contrary notwithstanding; and that the resolution of the House does not allow any evidence to be received to contradict such determination.—The committee have decided, that evidence may be given to show ambiguity in that decision; but then such evidence must be contemporaneous with the decision. Usage, undoubtedly, is evidence to explain an ambiguous determination; but then it must be contemporaneous, not subsequent, for the determination of the house cannot be affected by any subsequent usage: it is not the usage of the borough that is to be inquired into, but it is the sense in which the committee in 1669 used the word burgess; and, in explaining it, the committee cannot be guided by any evidence that was not contemporaneous with that decision. If there are two John Thomas's, it must be shown that there were two at the time of the devise; so, if there are two Blackacres. The ambiguity in a last determination, is like an ambiguity in a written instrument; in that case, you must show the state of things when the deed was made; in the present, when the resolution was passed, before the question of ambiguity can be raised; because, if not existing at that time, it cannot be affected by any subsequent circumstances. In the case of *New Radnor*, there was a last determination in 1690, evidence was received of a date prior to 1690, to explain an ambiguity in that decision, but the committee rejected evidence of a subsequent date. In the *Dorchester case*, evidence was received to explain a last decision; but then it was contemporaneous with the decision. On the petition from this borough in 1808, evidence was offered, of usage subsequent to 1669, which went strongly to show, that the freeholders possessed the right of voting; but the committee refused

(1) 2 G. 2, c. 24, s. 4; *et vide* 28 Geo. 3, c. 51, s. 25 and 31.

New Radnor.

Dorchester.

Evesham, 1808. *Vide* Note, *post*.

to receive any evidence of a subsequent date, notwithstanding its admissibility, was strongly urged by counsel. It is true, Lord Coke, in his Commentaries on the statute of Gloucester, says, that if any claimed before the justices in Eyre, any franchises by ancient charter, if the words were general, and a continual possession was pleaded; or if the claim was by old and obscure words, and the party, in pleading, expounded them to the court, and averred continual possession according to that exposition, the entry was *inquiratur super possessionem et usum*; and this, says Lord Coke, I have observed in divers records of those Eyres, agreeably to the old rule, *optimus interpres rerum usus.* But what does this prove, but that contemporaneous possession is to be proved by usage in cases of doubt? In the *Attorney General* v. *Parker* (2), Lord Hardwicke says, "that there is no better way of construing ancient grants and deeds than by usage, and *contemporanea expositio*, is the best way to go by;" and the judgment of Lord Kenyon, in the *King* v. *Bellringer* (3), goes to the same point, for he there "says, that contemporaneous usage has always been considered as of great importance in the construction of charters:" so that both these great judges, when speaking of usage as evidence, describe it, the one as *extemporanea expositio*, the other as contemporaneous usage. The cases of *Liskeard* and *Tewkesbury* (4), do not apply, for in neither was there any last determination; which, in the present case, it must be recollected there is; and, in *Chippenham*, the committee, after argument, held, that the resolution of 1640 was not a final determination within the meaning of 2 Geo. II. The committee may explain the resolution of 1669, if ambiguous, but cannot alter it; and how can they give any explanation to that decision, unless from evidence of the same date, and which might have been the foundation of such decision; for no subsequent usage could, by any possibility, have had any effect on the formation of that decision.

2 Inst. 282, *et vide* Phillips, 2 edit. 420; 3 edit. 476.

(2) *Attorney General* v. *Parker*, 3 Atk. 576.

(3) R. v. *Bellringer*, 4 T. R. 890, 21.

(4) Lit. 1; 1 Peckwell 210, 146.

For the sitting member, it was contended, that evidence of usage was to be obtained from what has subsequently taken place; and that it is from such evidence that the practice of more remote ages is to be collected. That the term, burgess, in the resolution of 1669, cannot be better explained, than by showing who have acted as such subsequently to that period. In Phillips's Treatise on Evidence, is the following passage, "If the language in ancient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage *under* the instrument may be resorted to, for the purpose of explanation; though it can never be admitted to control or contradict the express provisions of the instrument.'

Argument for sitting member.

(5) Phillips, 2 edit. 419.

In this case, it is proposed, to explain the meaning of the word burgess in the resolution of 1669, by showing, who have acted as such, subsequently to that decision. Neither Lord Kenyon (6) nor Lord Hardwicke(7) say, that nothing short of contemporaneous usage will do, they merely say that it is the best evidence; and Lord Coke(8), in his Commentary on the statute of Gloster, says nothing about the usage being contemporary; he cites the old rule, *optimus interpres rerum usus*, but he does not add any restriction that the usage must be contemporary. It is a principle of evidence, that the best evidence that can be procured, must be given; but if the best evidence cannot be procured, then that secondary evidence might be received. It is not contended, that in the present instance subsequent usage is the best or only evidence, or that it is conclusive evidence, but that it is admissible, *valeat quantum*: particularly as the decision of the house is of so remote a date, as to render the production of contemporaneous evidence next to an impossibility *. The best proof of right is possession. Here it can be shown, that the inhabitants of

(6) *R. v. Bellringer*, 4 T. R. 810.

(7) *Attorney General v. Parker*, 3 Atk. 576.

(8) 2 Inst. 282.

* The date of the earliest corporate book extant, was stated to be 1684.

Evesham, whether corporators or not, have been and are in possession of the right of voting, and that proof can be carried back to 1694. If a claim is made to an estate, the bare production of a deed would not avail the claimant any thing, unless he could show possession coupled with it. The evidence offered in this case is of a different nature to that rejected in *New Radnor* (9), and can be carried back much nearer to the date of the decision. In *Dorchester* (1), the interval between the last determination was not so great, and therefore parol evidence could be and was produced, to show what the usage of the borough was at the time the resolution passed in the house. In the cases of *Liskeard* (2), *Tewkesbury* (3), and *Chippenham* (4), the committee received evidence of usage. The right at present claimed was not called in question before the committee of 1808; each case, therefore, ought to stand on its own merits. In the present case, the last decision of the house says, that the right of voting is in the common burgesses; and it can be shown by long usage and documentary evidence, that the paymasters (that is the inhabitants of the borough paying scot and lot) have exercised the elective franchise, whether members of the corporation or not.

(9) *New Radnor.*

(1) *Dorchester.*

(2) *Liskeard*, 1 Peck. 110.

(3) *Tewkesbury*, ib. 146.

(4) *Chippenham*, ib. 262.

Resolutions. The committee resolved, "That this committee cannot receive evidence of usage subsequent to the determination in 1669."

"That the right of election is in the mayor, aldermen, capital and other burgesses, members of the corporation."

"That the right of election is not in the mayor, aldermen, and freemen, of the borough, and in the inhabitants of the borough paying scot and lot."

"That Wm. Edward Rouse Boughton is not duly elected."

"That Sir Charles Cockerell, bart. was duly elected, and ought to have been returned."

The vote of Arthur Styles was objected to, on the ground that his admission was not entered on a proper stamp. There was an entry in the corporation books, that on the 31st of August 1779, Arthur Styles was admitted to his freedom, in consequence of his servitude to Joseph Pratt, joiner. It appeared in evidence to have been the custom for the town-clerk to keep the stamped admissions together in a roll, instead of putting them in the book of the corporation, and on this roll there appeared to be the admission of Arthur Styles, entered on a proper stamp, agreeable to the date of his admission in the corporation books.

Vote of Arthur Styles, stamping.

"The committee resolved, that the admission of Arthur Styles appeared to have been entered on stamped paper, according to the provision of the act of parliament."

Resolution.

Vide *Drogheda*, post.

The admissions of many other freemen were objected to, as not having been entered on proper stamps, most of which cases were mere issues of fact. On the vote of Lawrence Gipps it was contended, that the committee could not strike off the votes of those freemen, who appeared to have been sworn in six years before the day on which they polled.

Vote of Lawrence Gipps, evidence.

The committee resolved, "That they could not receive evidence to impeach the corporate rights of persons who had been sworn in * six years before the day on which they polled."

It appeared, from the lists given of the objected votes, that the petitioner objected to 161 paymasters who voted for the sitting member; whereas the sitting member objected only to two of that description. The committee having resolved, that the right of election was in the "mayor, aldermen, capital and other burgesses, members of the corporation;" and not in "the

Votes not objected to in the lists, cannot be struck off the poll.

* But *quære*, is it not necessary that an entry of a voter's admission, on a proper stamp, should be given in evidence, before a committee can decide that he has been sworn in?

inhabitants paying scot and lot," (which were the class of voters objected to under the name of paymasters) the counsel for the sitting member proposed to strike off the poll those paymasters, who had voted for the petitioner, on the ground that the committee had decided, that such persons had no right to vote. And contended, that although the sitting member had not included the persons who voted as paymasters for Sir C. Cockerell, in his list of objected votes, delivered in pursuant to 53 Geo. III, c. 71. s. 1; yet the committee, having decided, that persons so claiming had not the right of voting, they must take notice of that circumstance, and strike off all voters of that description, from the poll of the petitioner.

Resolution. The committee resolved, "That they could not strike from the poll the votes of persons for the petitioner, against whom no objection had been stated in the lists delivered in by the sitting member."

After the committee came to the last resolution, the sitting member signified his intention not to prosecute his case any further.

NOTE.

CASE OF EVESHAM, 1808.

The Committee were chosen on the 11th of February, 1808, and consisted of the following Members:

Thos. Stanley, Esq. (*Chairman.*)
John Fane, Esq.
David Vanderheydon, Esq.
Wm. Mills, Esq.
J. Martin Lloyd, Esq.
Sir Charles Maurice Pole, Bart.
Wm. Meeke Farmer, Esq.
Quintin Dick, Esq.
Wm. Ord, Esq.
John Calvert, Esq.
James Buller, Esq.
Sir Wm. Ingleby, Bart.
Thomas Tyrwhitt, Esq.
The Rt. Hon. Geo. Tierney, Esq. for the Petitioner.
John Ingram Lockhart, Esq. for the Sitting Member.

Nominees.

Sitting Member: Sir M. M. Lopes, Bart.
Petitioner: H. Howarth, Esq.
Counsel for the Petitioner: Mr. Serjeant Lens and Mr. Scarlett.
Counsel for the Sitting Member: Mr. Dauncey and Mr. Manley.

THE petition stated, that Sir M. M. Lopes did procure many persons to be put on the poll; and many persons were, by the returning-officer, allowed to poll as voters at the last election, who had no legal votes. Petition

The numbers on the poll were:—

For Sir M. M. Lopes, Bart. - - -	334
For H. Howarth, Esq. - - - -	320

If the freeholders had a right to vote, Sir M. M. Lopes had a majority of 14; if their votes were rejected, a majority of 39 would remain on the poll in favour of Mr. Howarth.

The last determination was read, namely: "That the right of voting is in the common burgesses; and that the select election by the mayor, aldermen, and chief burgesses was not good." And the question raised for the consideration of the committee was, whether, under that determination, freeholders * had a right to vote. Last determination, 12 Nov. 1669. Argument, petitioner.

It was contended, on behalf of the petitioner, that under the last determination, freeholders had not a right to vote; and that under the term common burgesses, the right of voting was not extended to any who were not members of the corporation. It was not denied that freeholders had, in many instances, voted at elections; and it was argued for the petitioner, that evidence of such usage should be received, there being an ambiguity in the last determination, arising upon the signification of the term common burgess,

* Mr. Soley, the mayor, in answer to a question from the committee, as to what constituted a freeholder, stated, that a house within the limits of the borough, or the site of a house whereon one had formerly stood, constituted such a freehold, as it was claimed, gave a right to vote. Mr. Rudge's case of *Evesham*. p. 6.

Mr. Soley also stated, that there were four classes of voters who had voted during the time he knew the borough, viz. freemen, rights to freedom, paymasters, or those paying scot and lot, and freeholders.

which they were at liberty to explain, by showing what had been the usage of the borough subsequently to that determination. It was allowed by the counsel for the sitting member, that usage was in some cases evidence, but that it must be contemporaneous with the decision, and not subsequent to it; and that as the evidence of usage offered on the part of the sitting member was subsequent to 1669, it could not be received.

Argument, sitting member.

Resolution

The committee decided, that no evidence has been produced to show a right in the freeholders of voting, prior to 1669; and that nothing has been advanced to show the propriety of admitting evidence of usage, subsequent to that period.

The committee also resolved, that Sir M. M. Lopes was not duly elected; and that H. Howarth, esq. was duly elected, and ought to have been returned.

The evidence in this case, is not stated, the same being received, and the same rejected, by the committee in 1808 as in 1819.

The meaning of the word burgess, and the admissibility of subsequent usage to explain the sense in which that word was used in the determination of 1669, were argued at considerable length; but as the cases cited and arguments adduced, are necessarily comprehended in those urged before the committee of 1819, a repetition of them is thought unnecessary.

CASE III.

THE BOROUGH OF PENRYN, IN THE COUNTY OF CORNWALL.

The Committee was appointed on Wednesday the 17th of February 1819, and consisted of the following Members:

John Atkyns Wright, Esq. (*Chairman.*)
James Martin Lloyd, Esq.
Humphrey Howorth, Esq.
Spencer Perceval, Esq.
Edward Webb, Esq.
Robert Shapland Carew, Esq.
Samuel Stephens, Esq.
William Joseph Denison, Esq.
John Edwards, Esq.
The Hon. William Howard,
Richard Lyster, Esq.
John Edmund Dowdeswell, Esq.
Frank Sotheron, Esq.
George Holford, Esq. for the Petitioner.
Charles Harvey, Esq. for the Sitting Member.
} Nominees.

Petitioner: John Lavicount Anderdon, Esq.
Sitting Members: Sir Christopher Hawkins, Bart. and Henry Swann, Esq.
Counsel for the Petitioner: Mr. Warren, Mr. G. R. Cross.
For the Sitting Member: (Mr. Swann,) Mr. Serj. Pell, Mr. Harrison, and Mr. David Pollock.
The Return of Sir C. Hawkins was not disputed.

THE petition stated several grounds of complaint, all of which were immediately abandoned, except the charge of bribery. The petition likewise stated, that notice was given to the electors, as they came to the poll, by the petitioner, that Mr. Swann had been guilty of bribery, in order to procure his return at that election, and that he was thereby disqualified to represent them in parliament, and that all votes given for Mr. Swann, after that notice, would be thrown away, and of no effect; and concluded with a prayer, that Mr. Swann should be

The petition.

declared not duly elected, and that the petitioner was duly elected and ought to have been returned.

The committee resolved,

Resolutions of the committee.

That Henry Swann, Esq. was not duly elected a burgess to serve in parliament, for the borough of Penryn, in the county of Cornwall.

That John Lavicount Anderdon, Esq. was not duly elected a burgess to serve in this present parliament for the said borough.

That the petition of the said John Lavicount Anderdon, Esq., did not appear to the said committee to be frivolous or vexatious.

That the opposition of the said Henry Swann, Esq., to the said petition, did not appear to the said committee to be frivolous or vexatious.

Special Report.

Mr. Atkyns Wright also acquainted the House, that the said select committee had come to the following resolutions, which they had directed him to report to the house.

Resolved, That it appears to this committee, that Henry Swann, Esq., was guilty of bribery at the last election for the borough of Penryn, and is thereby incapacitated to serve in parliament at such election.

Resolved, That it appears by evidence before this committee, that John Goodeve, Henry Dunsford, and Abraham Winn, were guilty of corrupt practices, to influence the last election for the borough of Penryn.

Resolved, That it appears by evidence before this committee, that Henry Carter, Thomas Rosman, John Gill, Francis Major, James Cock, Charles Luckie Skinner, William Trathan, and William Lampshire, received bribes, to induce them to give their votes at the last election for the borough of Penryn*.

* On the motion being made, that the Speaker do issue his warrant to the clerk of the crown to make out a new writ for a burgess to serve in this present parliament for the borough of Penryn, an amendment was proposed, that such warrant should not issue, till the House had proceeded to take the said Report into further

It has not been thought necessary, in this case, to go through a detailed account of the bribery and corruption that was proved before the committee to have taken place at the last election for this borough, as the different cases which were brought under the consideration of that committee, were merely issues of fact, without involving any question of law. It is also presumed, that, without going through the different scenes, in which publicity was given to the bribery that took place, the special report of the committee will be considered as laying a sufficient foundation for the argument which arose on the claim made by Mr. Anderdon to the return, on the ground stated in the petition, namely, that, as the fact of Mr. Swann having been guilty of bribery, was notorious throughout the borough, Mr. Swann was therefore disqualified; and as Mr. Anderdon had given notice to the electors, as they came to the poll, of the disqualification and ineligibility of Mr. Swann, that all the votes subsequently given for Mr. Swann were thrown away, and that Mr. Anderdon ought to have been returned.

Statement of the case.

It was admitted, by the counsel for the petitioner, that they could not produce any case in which a committee had gone this length, although the point had frequently been noticed; but it was argued, that, in the present

Argument for the petitioner.

consideration, and the Minutes of the proceedings of the committee were ordered to be laid before the House. Votes, Feb. 26, 1819, p. 132.

The debate on the above amendment was then adjourned to a future day. On the 22d of June, Sir C. Burrell and Mr. C. W. Wynne were ordered to bring in a bill for the prevention of bribery and corruption in the borough of Penryn; and the Speaker was directed not to issue his warrant to the clerk of the crown till a fortnight after the next meeting of parliament. When parliament met in November, leave was given to bring in a similar bill, which has been printed and ordered to be stuck up on the church-door at Penryn, but the bill has not yet passed. The issue of the Speaker's warrant is still suspended. Feb. 12, 1820.

nstance, such a scene of bribery and corruption had been disclosed, and so singularly manifest and notorious did the acts of bribery appear to be, throughout the town of Penryn, independent of the public notice given by the petitioner at the poll, that no one in the town was ignorant of the fact, and, to use the words of one of the witnesses, "it was in every body's mouth;" and that, as both the law and the fact were notorious, that this case could not be distinguished from that class of cases (1) already familiar both in the courts of Westminster, and in proceedings before committees, in which it had been held, that where a candidate, either for a seat in parliament, or an office, laboured under any notorious disqualification, that he was thereby rendered ineligible; and, where notice was given of such disqualification to the electors at the time of election, that all votes subsequently given for such candidate must be considered as thrown away, and the candidate as not *in esse* for the purposes of that election; and the person so disqualified, though returned by a majority, has been declared not to be duly elected, but his opponent, with a minority on the poll, seated, on the ground, that at the time of election, such person was ineligible, and ought not to have been admitted as a candidate. In the present instance, the sitting member was disqualified by statute; and the fact which brought him within the purview of the statutes creating the disqualification, were as notorious as the law itself, to every person within the borough. The resolution of the House of Commons, of 2d of April 1667, declares, that any person who shall expend more than 10*l.* in treating, after the *teste* of the writ, shall be incapable of sitting in parliament, by virtue of any such election. The 7th William & Mary enacts, that every person giving, &c., shall be disabled and incapacitated upon such election to serve in parliament, and shall be deemed and taken, &c., as no

(1) *Taylor v. The Mayor and Aldermen of Bath.* B. R. Mic. 15 G. II. *R. v. Hawkins,* 10 East. 211. *Kirkcudbright* 1 Luder, 72. 2d *Southwark* and 2d *Canterbury, Clifford, Fife County,* 1 Luder, 455 *Flint County.* 1 Peckwell, 526.

7 W. 3, c. 4.

member* in parliament, and shall not act, &c. but shall be declared and enacted to be, to all intents and purposes as if they had *never been returned or elected* members for the parliament, which clause may be read, as if he had not been returned; which is, in fact, the case, for, by the act of bribery, the party becomes actually disqualified and ineligible. Then the notoriety of the fact in this case, both by public notice given, and otherwise being fully proved, it cannot be distinguished from the cases cited; in which a previous disqualification, notorious to the electors at the time of election, has been held to render the disqualified candidate so entirely ineligible, as to void all votes given for him.

Argument for sitting member.

For the sitting member it was contended, that the principle of the cases cited in the argument for the petitioner, did not apply to the present case; because, in every case alluded to, there had been a notoriety of fact as well as law, that in the case at present under consideration, it was merely the charge of a fact done that was notorious, not the fact itself; that in the second *Southwark* and *Kirkcudbright cases*, the candidate had taken the resolution of the committee, declaring their opponent guilty of bribery or treating at the last election, in their hands; and at the same time that they declared the fact, they produced the judgment of a competent court, as the authority for such declaration;

* 7 W. III, c. 4. sec. 2. And it is hereby further enacted and declared, That every person and persons so giving presenting or allowing, making promising or engaging, doing, acting or proceeding, shall be, and are hereby declared and enacted, disabled and incapacitated upon such election to serve in Parliament for such county, city, town, borough, port, or place; and that such person or persons shall be deemed and taken, and are hereby declared and enacted, to be deemed and taken, no members in parliament, and shall not act, sit, or have any vote or place in parliament, but shall be and are hereby declared and enacted to be, to all intents, constructions and purposes, as if they had been never returned or elected members for the parliament.

whereas, in the present instance, there was merely a charge made, and that charge was not assented to, but disputed and disavowed; and which charge, even if true, was not in a shape to disqualify the candidate, till the judgment of a committee, or of a court of law, had been had upon it. Whether or not a person be guilty of bribery, is a deduction of law, arising from certain facts, and that drawn by a court of competent jurisdiction; here it was merely a charge, and in this the fallacy lies: the fact could not be notorious without inquiry, and the judgment of the committee cannot refer back to the time of election to perfect the disqualification.

In the case of *Fife*, General Skene admitted, that he held the office; he merely disputed that the possession of it created a disqualification, but upon that point the act of parliament was decisive; and in that of *Flintshire*, the minority of Sir Thomas Mostyn was not denied, neither in *Taylor* v. *The Mayor* and *Aldermen* of *Bath*, or *Rex* v. *Hawkins*, was the fact creating the disqualification disputed, or a matter for the consideration of a court; but in the *Abingdon case*, where the disqualification might have appeared in some measure doubtful, the petitioner was not seated, but it was merely held to be a void election. It is true, there is no decision to support the doctrine contended for by the petitioner, and what is more, it is impossible there ever should be one;—if what is contended for on the part of the petitioner was law, it would be in the power of any unprincipled man, by advancing a false charge, to defeat at any time, a majority of electors of their elective franchise. The 7th of W. III, does not say that persons offending against that act cannot be returned, it only enacts, that persons so offending, shall not sit or act as members of parliament.

See case of *Leominster*, and note *ante*.

Resolution. The committee resolved that John Lavicount Anderdon, Esq. is not duly elected.

Abraham Winn was a clerk at the Moorstone works, near Penryn; he was stated to have been an active partizan of Mr. Swann, and frequently about with him at different places during the election; that in one instance Mr. Swann told a voter to go to the quay, and he would send some one to him who should satisfy him, and afterwards added, I will send Abraham Winn to the quay, and that Winn almost immediately afterwards came to him at the quay, that the voter saw Winn coming towards the quay whilst he was talking with Mr. Swann. When Winn came to the quay, he told the voter to go with him to a certain house, which he did, when he was taken by Winn into a back room, and offered money by him to vote for Mr. Swann. Another voter proved that he received directions from Winn to follow Mr. Swann at night, on his canvass, to see that he was not watched or interrupted by the opposite party. Winn's agency.

The Committee received evidence of acts done by Mr. Winn, as agent for Swann. Resolution.

Joseph Sewell was a maltster at Penryn, and an active friend of Mr. Anderdon. It was in evidence that there had been two meetings at the Fifteen Balls, one on the 25th of May, the other on the 1st of June; neither Sewell nor Mr. Anderdon were at the first Meeting *. Mr. Anderdon came to Penryn on the 1st of June, and the same day came with Sewell to the meeting at the Fifteen Balls, where Sewell, at the request of the company, took the chair; this was a meeting of the friends of Mr. Anderdon. It was also stated, that Sewell generally accompanied Mr. Anderdon on his canvass, and was on the hustings during the poll; and that one day when he was told to come down, as he had no right to be there, Sewell said he had, being agent to Mr. Sewell's agency.

* At the meeting on the 25th of May, some resolutions were passed, and Mr. Anderdon said, at the meeting on the 1st of June, that he came amongst them in consequence of the resolutions passed at that meeting.

Anderdon. Mr. Anderdon was on the hustings at the time, but it was not proved that he heard Sewell say he was his agent. One voter proved that Sewell introduced Mr. Anderdon to him as a candidate, and told him that he had brought Mr. Anderdon down from London, in consequence of the meeting at the Fifteen Balls on the 25th of May.

It was objected on behalf of the petitioner, that the counsel for the sitting member could not proceed in an examination, to show what Sewell had said in the absence of Mr. Anderdon, on the ground, that no sufficient evidence had been adduced to show that Sewell was an agent of Mr. Anderdon.

For the petitioner it was argued, that there was not sufficient evidence to show that Sewell was an agent to Mr. Anderdon. That attending a candidate on his canvass, was not sufficient to prove a man his agent; that the declaration of Sewell at the hustings, must go for nothing; it was proved there was a great crowd, and it probably was said by Sewell, to avoid losing a good place; at all events it was necessary to show that Mr. Anderdon heard Sewell make the declaration before he can be affected by it. That it was necessary his agency should be recognized by Mr. Anderdon before evidence could be given of acts done by him, as the agent of Mr. Anderdon; because, to affect the principal, it must be shown that his mind was assenting to the acts of the agent:—that it was on this ground alone, that acts done by an agent were evidence against the principal.

Agency of Curgevenen, *Mitchell case*, 1 Lud. 83.

For the sitting member it was contended, that enough had been proved to show a general agency in Sewell, and if so, that was sufficient as a general agent (1) for lawful purposes, has been held to be an agent for all purposes during the election. Sewell comes with Mr. Anderdon to the meeting on the 1st of June; attends him on his canvass; introduces him to voters, as a candidate

(1) 2 Peck. 185.

brought down by himself, in consequence of the meeting on the 25th of May. If Sewell had not acted as agent for Mr. Anderdon, it was competent for Mr. Anderdon to have called him to prove that he was not his agent*.

The committee allowed the examination to proceed.

Resolution.

It was in evidence, that on Friday evening a voter of the name of Lampshire, came to a house where Abraham Winn and Wm. Timmins were, and said he wanted some money to vote, and would not vote unless he had it;—that Winn desired Timmins to keep him there, and give him plenty to drink, and said he was such a rogue that he would not give him the money till he went into the hall to poll. Winn went away, and returned the next morning. Timmins remained all night with Lampshire. When Winn returned the next morning, he wanted Lampshire to go to poll; Lampshire said he would not go without he had the money; he, after some persuasion, went with Winn, who told him he should have the money before he went into the hall. Timmins saw Lampshire and Winn go together to the steps of the hall. Lampshire staid away long enough to have voted. Timmins saw Lampshire come out, he had then five or six notes in his hand, he came back to the house where he had left Timmins.

Evidence. *Lampshire's case*, declaration of voter after having polled.

The counsel for the petitioner asked Timmins the following question:—

"Did he state to you from whence he had those notes?"

The counsel for the sitting member objected to this question being put, and argued, that after a voter has exercised his franchise, he cannot be admitted to invalidate his vote; nor can his declarations be received in evidence against the person for whom he has voted, though in some cases they may be evidence before the vote is given, this point having been decided in the *Middlesex case* (2).

(2) *Middlesex case*, 2 Peck. 141.

*Neither Sewell nor Winn were called to negative the fact of agency.

The petitioner's counsel did not dispute the principle contended for on the other side, but supported the question, on the ground, that he was not examining to what Lampshire said, as evidence of a declaration made by him after he had voted, but that he was examining to it as part of the *res gesta*, and to explain what had passed before he gave his vote.

The objection was waived.

Evidence. *Trathen's case.* Argument, petitioner.

Evidence was given, on the part of the petitioner in his case, to show, that a voter, named Wm. Trathan, had received money to vote for Mr. Swann. The sitting member afterwards called Trathan as a witness, which was objected to by the counsel for the petitioner, on the ground that he was not competent, being a party, and that he could not be examined in support of his own vote. That it was in evidence, that he had voted for Mr. Swann, and likewise that he had received money to do so. That no individual was allowed to give evidence in his own favour; if that was permitted, no one would ever be convicted. That Trathan was interested; he has been charged with bribery, and comes to clear himself:—objected to on two grounds:—1st. As being a voter; 2dly. As coming to prove that he has not been bribed.

Argument, sitting member.

For the sitting member it was contended, that he was a competent witness for some purposes at least, if not for all.

Resolution.

The committee determined, "that Wm. Trathan is a competent witness for the general purposes of the election: that he cannot be examined to rebut the evidence of his having been himself bribed."

The Counsel for the sitting member then observed, that they had not been heard on the latter part of the resolution.

The committee informed the counsel for the petitioner, that they should be heard, when an objection arose to any question that might be put.

The examination proceeded; but when Trathan was

examined, to contradict facts spoken to by Cock and Timmins, the two witnesses who had sworn to his having been bribed, the objection, arising on the second part of the last resolution of the committee, was renewed on the part of the petitioner. For the sitting member it was argued, that they were at liberty to examine Trathan, to contradict Cock and Timmins. That the parties before the committee, were Mr. Swann and Mr. Anderdon:—that Trathan was not interested now, whatever he might have been before the passing of 53 Geo. III, c. 7. because in the lists of objections delivered in, pursuant to that act, Trathan was merely objected to, as having voted for Mr. Swann, after notice given by Mr. Anderdon, not as having been bribed.—Trathan's vote, therefore, cannot be called in question on the present charge; if he had been objected to as having been bribed, it might then have been contended, that he was interested in establishing his vote, but now that ground of interest does not apply. If such evidence is not receivable, one worthless man may deprive another of all evidence, by including all his witnesses in a charge of bribery. The rule of law is, that if another has a right to your evidence, that you cannot deprive him of it:—if A. lays B. 100*l.* that C. will lose his cause, C. shall not be thereby deprived of his evidence. In *Bent* v. *Baker*, it was held, that one underwriter, who had subsequently underwritten, was a competent witness for another underwriter on the same policy. In the *Sudbury* case, a person, who had laid a wager on the event of the petition, was nevertheless held to be a competent witness. Trathan is not called to exculpate himself: this proceeding does not at all resemble an indictment; this is a civil suit, between Mr. Swann and Mr. Anderdon, in which Trathan has no interest. If Mr. Swann were prosecuted for bribing Trathan, he would be a competent witness on the trial of the indictment, to

Argument, sitting member.

Bent v. *Baker*, 3 T. R. 27.

show that he had not been bribed by Mr. Swann. The question is not, whether Trathan is a credible, but whether he is a competent witness.

Argument for petitioner.

For the petitioner it was answered, that a witness need not be a party to be incompetent, if he is interested, that is sufficient. What was the case of parishioners, on the trial of an appeal before the 52d G. III,?—Trathan is interested in the vote he gave, and interested in the exculpation of his own character. That before you can claim a right to evidence, under the circumstances stated by the counsel for the sitting members, you must show, as in *Bent* v. *Baker*, that your right to the evidence accrued before, what would otherwise have been the disqualifying act, took place; in this case Trathan was bribed first, and voted after.

Resolution.

The committee resolved, that they adhered to the latter part of the former resolution.

Hand-bills, Evidence.

On the part of the sitting member, an endeavour was made to connect Mr. Anderdon with three hand-bills, published by a printer in Penryn, on the ground that Mr. Anderdon had paid for two of them himself, and that the third had been ordered and paid for by Mr. Richard Sewell, a partizan of Mr. Anderdon. The first, was addressed to the independent electors, and was brought to the printer by Richard Sewell, on the 24th of November 1817, and was paid for by him after the election was over:—the second was styled, "a friend to the well-wisher," and was brought to the printer by Wm. Cock, on the 1st of June 1818:—the third, signed "an elector," was dated June the second, and was brought by Thomas Toy; both Cock and Toy were in Mr. Anderdon's interest. The two last were paid for by Mr. Anderdon, forming two items in a bill for stationary, cards, and printing, had by Mr. Anderdon during the election. The bill was stated to be lost. The printer said it was made out in separate items; as follows:

" To the friend to the well-wisher," 100 copies - - - - - - - 8*s*.

" An Elector," 100 copies - - 8*s*.

Argument for petitioner.

On this evidence, it was objected on behalf of the petitioner, that these hand-bills could not be received in evidence, nothing having been proved to connect Mr. Anderdon with them. That the first was printed many months before Mr. Anderdon came near the borough, and the two last, one, the day he arrived, and the other, the day after; that the only circumstance stated to connect Mr. Anderdon with these hand-bills, was, the fact of his having paid for the two last; but then they were paid for in a general bill, incurred for stationary and printing during the election, and by a printer who was employed by all the candidates. That as there was nothing which shewed any privity between Mr. Anderdon and the hand-bills; the fair inference was, that the hand-bills were prepared for whoever should come down as candidate, and Mr. Anderdon coming down, they were put down to his bill, and paid for by him, merely as an electioneering charge belonging to his party.

Argument, sitting member.

For the sitting member it was contended, that although there might have been no privity on the part of Mr. Anderdon originally, yet, that he had adopted the hand-bills by paying for them, and consequently, that they were evidence against him.

Resolution.

The Committee rejected the hand-bill dated the 24th November 1817, altogether, and resolved, that the other two could not at present be received.

Further evidence.

The printer was called in again, and stated, that on asking Mr. Anderdon to pay for the two hand-bills, Mr. Anderdon told him, that he had paid Joseph Sewell for them, and that Sewell would pay him; that Sewell refused to pay him in consequence of his having offended Sewell, when he again requested payment of Mr. Anderdon, who then paid him. The bill was not produced,

but the receipt was given in evidence; which was as follows:

"Received of John Anderdon, Esq. the sum of 4*l.* 18*s.* 5*d.* due for sundry bills."

The admissibility of the two hand-bills was again argued.

Resolution. The committee resolved, that they should not be received in evidence.

CASE IV.

CITY OF CHESTER.

The Committee was chosed on the 19th of February, 1819, and consisted of the following Members:

Rich. Wharton, Esq. (*Chairman.*)	Sir Ulysses De Burgh, Bart.
Lord T. Cecil.	Thomas Knox, Esq.
Hon. George Ellis.	Arthur Chichester, Esq.
T. P. Symonds, Esq.	John H. Allen, Esq.
Robert T. Wilmot, Esq.	Hon. Robert Clive.
Hon. Edward Finch.	Wm. Ralph Cartwright, Esq. for the Petitioners. (Nominees.)
Sir Charles Hulse, Bart.	James Calcraft, Esq. for the Sitting Members. (Nominees.)
George Smith, Esq.	

Petitioners: Sir J. Grey Egerton, Bart. and J. Williams, Esq. Freemen.

Sitting Members: Hon. Gen. Grosvenor and Visc. Belgrave.

Counsel for the Petitioners: Mr. Warren, Mr. Serjeant Cross.

for the Sitting Members: Mr. Harrison, Mr. Abraham Moore.

Petitions. BOTH petitions charged the sitting members with having been guilty of bribery and treating, by themselves and agents, at the last election for the city of *Chester*.

The material facts stated in evidence were as follows: That during the late contest for the city of Chester,

nearly 4,000 tickets had been issued to freemen in the interest of the sitting members, entitling the bearers to refreshment at different public-houses; some to the amount of two gallons of ale, some double that quantity, and some as high as eight, ten, or twenty gallons; which tickets were addressed to different publicans in the town, and signed J. Fletcher *. That in many instances these tickets had been presented, as directed, and that refreshment, liquor or food, to the amount mentioned in the ticket had been afforded to freemen presenting them, who had also voted for the sitting members. That these tickets formed a sort of currency in the town, and were, in several instances, paid as cash by the publicans to the brewers;—in one case, in satisfaction of a distress;—and in another, as security for a debt. It did not, however, appear that any of the tickets had, as yet, been paid, either by J. Fletcher, or any one else. That Mr. Fletcher, who was an opulent tradesman of the city of Chester, and a member of the corporation, attended constantly at the committee-room, at the hotel, where the friends of the sitting members met to promote their interest. That Mr. Fletcher was generally in that room, from an early hour in the morning, till a late one in the evening, attending to the business of the election. That these tickets lay about the room in great numbers, and that Mr. Fletcher had given some of them to persons in the interest of the sitting members, who were called captains of districts; and that the sitting members had been in the room whilst these tickets were lying about. Mr. Fletcher admitted the signature to the tickets to be his, and likewise that they were circulated among freemen in the interest of the sitting members, but denied that the sitting members knew any thing about them. That they had not

* "The bearer, A. B., is to have such refreshments as he thinks proper, to the value of two gallons of ale, at the C. D. public house.

(Signed) "J. FLETCHER."

been consulted about the measure, but that it had originated with a party friendly to them in the city, who were anxious to secure their return. That the tickets were not yet paid, and that he considered himself liable to the amount issued. That he had no promise or expectation of being repaid by either of the sitting members; but that several gentlemen had agreed, together with himself, to be answerable, if necessary, for the expenses of the election. A band of nearly seventy persons were employed, and paid at the rate of 1*l.* 11*s.* 6*d.* *per diem*, by Mr. Fletcher, many of whom were voters, and which cost upwards of 1,500*l.* Mr. Fletcher admitted that an advertisement, headed "Chester city election*," which appeared in the Chester paper soon after the election terminated, had been inserted by himself. It also was in evidence, that in one of the rooms occupied by the sitting members at the hotel, a table was laid out each day with cold meat, &c. of which many friends of the sitting members partook, some freemen, some not, and some friends from the country. That on one occasion, General Grosvenor being in the room, desired the party at table to make themselves comfortable, and ordered the waiter to bring up more wine. Evidence was also called to show, that refreshment was to be had by voters in the tally-room previous to voting; and that Mr. Dent, an attorney and agent for the sitting members, had signed tickets for refreshment, similar to those issued by Mr. Fletcher; and two tickets signed J. Dent, were produced, one of which

* "Chester City Election.—All persons who have any demand on account of the election of Gen. Grosvenor and Lord Belgrave, are requested to send the particulars thereof, by post, (to prevent trouble) to John Fletcher, printer, on or before Sunday the 18th inst. in order that they might be examined; after which, notice will be given of the time and place of payment.

"Chester, July 9, 1818."

This advertisement appeared in a paper, of which Mr. Fletcher himself was the editor and proprietor.

gave directions for a dinner for ten persons, and twenty gallons of ale. On the other hand, it was stated, that no refreshment entered the tally-room, but what voters and friends had occasionally called and paid for themselves, whilst waiting to poll, excepting for Mr. Dent and his clerks, he having found it inconvenient to let them go away to get refreshment elsewhere; and also, that Mr. Dent had issued no tickets during the election, excepting some for the runners who were about the office. That General Grosvenor and Lord Belgrave lived at the hotel during the election. That two accounts had been kept; one private, amounting to 90 *l.*, which General Grosvenor had paid, and another general account, to which what had been consumed in the card-room, where the table with cold meat was laid out, and other rooms in the house, had been charged. This account was headed Mr. Dent & Company, and amounted to upwards of 600 *l.*, and had not then been paid. The landlord of the hotel stated, that he had received no instructions whatever from the sitting members respecting the provisions which had been consumed, and that he had no expectation of being paid any part of it by either of them.

Argument, petitioner.

It was not argued whether or not, the facts in evidence amounted to treating, if brought home to the sitting members or their agents, but on the part of the petitioners it was contended, that sufficient had been proved to connect the acts of Fletcher and Dent with the sitting members, as agents; but, at all events, there had been such entertainment, by and on behalf of the sitting members, as to avoid the election under the 7th Wm. III. (1), and cited *Ribbons* v. *Cricket* (2).

(1) 7 Will. 3, c. 5.

(2) 1 Bos. & Pul. 264.

For the sitting member it was argued, that *Ribbons* and *Cricket* was not conclusive; and cited *Rose* v. *Smith* (3), and *Riddler* v. *Moore* (4). That a candidate had never been held to be responsible but for his own

(3) 1 Cliff. 103.

(4) Ib. 571.

acts, and those of his agents (5); and that in the present case, the other side had not only failed in proving the agency of Fletcher, but on the contrary, his agency had been expressly disproved.

(5) *Ilchester*, 1 Lud. 462; *Honiton*, 3 Lud. 143; 2 *Ilchester*, 1 Peck. 304.

Resolution.

The Committee resolved, that Lord Viscount Belgrave and General Grovesnor were duly elected.

Production of the poll.

Mr. Finchett, the town clerk and under-sheriff of Chester, produced the poll-book, which, he stated, he believed *, he had received from the sworn poll-clerk of the sheriffs, who were the returning officers, soon after the election, at his office; that it had remained unaltered in his custody ever since, and that he was the proper officer to have the custody of it; that he had not seen the book at the close of the poll. The election ended on a Friday, and he received the book that evening or the next morning; that he knew the poll-clerk, and was frequently in court during the election, where he saw him act as poll-clerk. On this evidence the counsel for the sitting members objected to the poll being received in evidence, on the ground that it had not been sufficiently authenticated. The point was argued, and the committee resolved, that the poll-book was not sufficiently proved. On the next day †, however, the poll-clerk himself was produced, who proved the poll-book to be in his hand writing, and the same he took at the poll; and that it was delivered by him at the close of the poll, either to Mr. Finchett or the assessor. The poll-book was then received.

* It was not quite clear, whether Mr. Fletcher received the poll from the poll-clerk, or from the returning officer.

† The committee sat on Friday, when the objection to the poll being received in evidence was taken, the question was argued on Saturday; and on the Monday morning, the poll-clerk was produced, an express having been sent for him to Chester, as soon as the objection was taken. Vide *Drogheda*, *Limerick*, and *Bristol*, *post*.

CASE V.

CITY OF BRISTOL.

This Committee was appointed on the 17th of March, 1819, and consisted of the following Members:

Edward Berkeley Portman, Esq. (*Chairman.*)	Hon. J. F. Campbell.	
J. Dawkins, Esq.	Hugh Seymour, Esq.	
W. E. Powell, Esq.	Sir Lowry Cole.	
G. R. Dawson, Esq.	Lord W. H. C. Bentinck.	
Ralph Franco, Esq.	W. T. Money, Esq.	
W. Newton, Esq.	T. Pares, Jun. Esq. for the Petitioners.	Nominees.
Sir Alexander Don.	C. W. W. Wynn, Esq. for the Sitting Members.	Nominees.
Earl Mount Charles.		

Petitioners: Electors.

Sitting Members: R. H. Davis, Esq. and Edward Protheroe, Esq.

Counsel for the Petitioners: Mr. Serjeant Bonsanquet, and Mr. G. R. Cross.

Counsel for the Sitting Members: Mr. Warren, Mr. Maule, and Mr. Osborne.

Petition.

THE petition stated, that, at the last election for *Bristol*, Richard Hart Davis, Esq., and Edward Protheroe, Esq., were candidates, and that, at the same time, Colonel Hugh Duncan Baillie was put in nomination; that the show of hands was in favour of Mr. Protheroe and Colonel Baillie, and that a poll was demanded on the part of Mr. Davis, which was granted;—That the poll commenced on the 16th of June, and closed on the 20th, when Mr. Davis and Mr. Protheroe were declared duly elected.—That the poll was closed earlier than it ought to have been.—That it began at nine o'clock, (except the first morning,) and continued until six in the afternoon except the last day, when it finally closed at four.

—That it had not been the practice to keep the poll open so long each day.—That many persons, who tendered their votes for Colonel Baillie, were refused, and that Mr. Stocking, on behalf of the unpolled electors, protested against the close of the poll.—That non-resident voters, who came to poll, were prevented voting.—That 4,137 voters polled.—That 6,000 are entitled to vote; and, consequently, that nearly 2,000 persons had been deprived of their franchise.

Evidence. The facts stated in evidence were as follows:—Some time prior to the election, a meeting of the friends of Colonel Baillie took place, at the Bush Tavern, to promote his return for the city of Bristol at the ensuing election; in consequence of which meeting, Mr. Protheroe had signified his intention not to offer himself again as a candidate. Afterwards, a meeting of the friends of Mr. Protheroe took place, the result of which was, that Mr. Protheroe was induced to stand, when Colonel Baillie declined coming forward, and the committee formed at the Bush, in his interest, dispersed.

Tuesday, the 16th of June, was the day of nomination; and, on Saturday the 13th, a meeting, attended by many electors of Bristol, was held on Brandon Hill, where resolutions were passed; in pursuance of which, Colonel Baillie was put in nomination. On the evening of Friday the 12th, Colonel Baillie had been applied to, again to come forward, on the ground, that there were many electors who were determined to put him in nomination, to which, Colonel Baillie replied, "that was the business of the electors; but, for himself, having made up his mind to resign, he should not come forward again." After the meeting on Brandon Hill was over, several persons, friendly to Colonel Baillie, formed themselves into a committee at the Guildhall Coffee-house, to further his return. On Monday, the 15th, other friends, desirous of his return, met at the Bush for the same purpose, and sent a deputation to

Colonel Baillie, requesting that he would allow himself to be put in nomination the next day. The object of both committees was, the return of Colonel Baillie; but they did not co-operate further, than having the same end in view. On Tuesday, the 16th, the sitting members, and Colonel Baillie, were put in nomination; when the show of hands being in favour of Mr. Protheroe and Colonel Baillie, a poll was demanded. Colonel Baillie did not appear on the hustings, either on that or any succeeding day, nor did he take any part in the election; but several electors acted as counsel, agents, and check-clerks, to procure his return. The poll was taken at four places at the same time, and commenced after the nomination on Tuesday, and finally closed at four o'clock on Saturday following; beginning each day, excepting Tuesday, at nine, and closing each evening, excepting Saturday, at six. On Tuesday, 654 persons polled; on Wednesday, 1,495; Thursday, 1,143; Friday, 711; and, on Saturday, 118. The numbers on each day's poll were, on—

	Davis.	Protheroe.	Baillie.
Tuesday	528	384	256
Wednesday	1,284	813	654
Thursday	910	589	491
Friday	567	398	245
Saturday	88	75	38
TOTAL	3,317	2,259	1,684

On Friday, the numbers polled between the different hours were as follows:—between nine and eleven o'clock, 281; between eleven and twelve, 135; twelve and one, 74; one and two, 76; two and three, 67; three and four, 44; four, and half-past four, 16; half-past four, and five, 11; from five to half-past five, 3; half-past five to six, 4.

On Saturday,	Davis.	Protheroe.	Baillie.
9 to 10	1	1	0
10 to 11	18	14	4
11 to 12	13	17	6
12 to 1	8	7	3
1 to 2	7	4	5
2 to 3	14	13	10
3 to 4	7	4	3
	68	60	31

The numbers taken by one of the four poll-clerks went at once from one o'clock to four, which are, therefore, not enumerated in the above list. One poll-clerk did not enter a single vote from one till four; and another, likewise, from three till four.

It was also stated, that it had not been usual to poll many votes the day of nomination, the time being, generally occupied with speeches; and that Saturday was a market-day, consequently, one on which many of the voters could not conveniently come to poll. The right of election at Bristol is in the freeholders and free-burgesses; all the sons of burgesses are free, and the daughters communicate the freedom of the city to their husbands. The precise number of voters was not stated; but witnesses estimated the residents at about 4,000, and the non-resident 2,000. The greatest number upon record, as having voted at one time, was in 1784, when 6,094 voted; in 1774, 5,384; in 1754, 5,060; and, in 1734, 4,000; from 1784 to 1812, there had not been a full polling. In 1812 there were two elections, one in June, and another in October. In June, the poll lasted thirteen days, but it did not appear how many then polled. In October 1812, it lasted ten days, and 4,389 voters were polled. In June 1812, the poll was open about eight hours each day. It was stated, that prior to the year 1812, the poll was taken at two places only; but few non-resident voters polled on the present

occasion. One gentleman stated, he had a list of 737 voters resident in London alone. A voter also stated, that he arrived at Bristol on Saturday night, and, another, that he came on Sunday morning, with an intention to poll, both having come from London for that purpose, but were too late; as were five other voters from the neighbourhood of Bristol, who got to the Guildhall Coffee-house, as the clock was striking four. It was also in evidence, that several out-voters arrived, in the beginning of the week. At the close of the poll, at four o'clock, on Saturday, two voters handed up the copies of their admissions, wishing to vote for Colonel Baillie, but were not received. Before the copies were put up, the sheriff said to Mr. Palmer, the town-clerk, "it is four o'clock;" and when the copies were handed up, he said, "proceed, Mr. Palmer."

The first proclamation, that voters should come in and vote with all expedition, was made at four o'clock on Friday; the same was repeated at half-past four, and, again, at ten minutes after five. At half-past five, proclamation was made, to come in, and vote with all expedition, otherwise the poll would be finally closed: At six, proclamation was made, that all persons should come in between nine and four the following day, as the poll would be finally closed at four o'clock. On Saturday, the first proclamation was made at one o'clock, the voters having previously been frequently desired by the town-clerk to come in and poll. The town-clerk stated, he sometimes sat half-an-hour without a vote. At two and three, the same proclamation was repeated at the usual places: viz. the hustings, the top of the steps, and the street-door; the same at a quarter and three-quarters past three. At three-quarters past three, it was said, the poll would finally close at four:—At four, the poll was closed.

About three o'clock on the Friday, the assessor expressed a wish to Mr. Stocking, a member of the Guildhall committee, that the voters should come up faster,

and that if they did not, that he should close the po ll he also inquired whether Mr. Stocking would undertake to say, that any considerable number were coming up, to which, Mr. Stocking replied, " that they had no control, that the voters had not been brought up in that manner, that they had come voluntarily throughout the election, and that there were a considerable number to poll, and that they were coming up as fast as could reasonably be expected; and that if the sheriffs closed the poll under such circumstances, that they would do it at their peril." Similar conversations were held two or three times between three and six; when the assessor addressed Mr. Stocking, and said, " he thought the sheriffs had a right to close the poll at that time, but that it would be better for persons to do it by consent; and that he thought it was an act of courtesy from himself to Mr. Stocking, as one of the principal agents of Colonel Baillie, to inform him what he intended to do, that he did not wish to do any thing that might appear ungracious; and as the notice had been very short, they would not close the poll on that day, but the next, at four o'clock." To this, Mr. Stocking answered, that " he was not Colonel Baillie's agent; that it was not a contest between Colonel Baillie and the other candidates, but that it was begun and continued by the electors, and that there were 2,000 electors then unpolled;—that if he was considered as an agent at all, it must be as the agent of the electors, and that he would not consent that the poll should be closed whilst 2,000 voters had not polled." The assessor asked Mr. Stocking whether " he would pledge himself that such a number of voters could be brought, as would considerably lessen or overcome the majority that was against Colonel Baillie?" Mr. Stocking said " they did not profess to have any control over the voters, that they were mostly non-residents; that he had every reason to hope there would be a majority; but, that he neither would, nor could pledge himself, to bring up any number

of voters; and that if the sheriffs closed the poll, it would be done without his consent, and at their own peril." Several conversations to the same effect took place on Saturday, at different times; and at the close of the poll, Mr. Stocking and Mr. James Mills, another member of the Guildhall committee, again protested against the poll being closed.

After the poll was closed, the two voters who had handed up their copies (before the sheriffs said, " proceed Mr. Palmer") again tendered their votes, and Mr. Mills said, that they expected fifteen men from Hanham in the course of an hour; and also protested, in the name of the unpolled freeholders and burgesses, against the poll being closed.

The committee at the Bush Tavern, was dissolved on Friday the 19th; Mr. John Mills, a member of that committee, was in the hall on the Friday afternoon, and sent a note up to the assessor:—a few minutes after which, the assessor said " if there were any gentleman of Mr. Baillie's committee present, who had any thing to say to him, he should be glad to hear him;" to which Mr. John Mills immediately replied, " that he was one of Mr. Baillie's committee; that the assessor must be aware of the nature of the election; that it assumed a very singular feature, from the commencement; that Mr. Protheroe had retired, and had been brought forward by his friends; and that Colonel Baillie had also retired, and afterwards been brought forward by his friends; that it altogether assumed the shape of a popular election, and being in the hands of the people, who came up just as they pleased, either in numbers or in single files, they felt they had no controling power; and therefore they had dissolved themselves, and were no longer in existence as his committee; but that it was but candid to tell him (and it was a matter for his consideration) that at the moment the committee dissolved, the whole table was covered with letters from out-voters, promising to be there the fol-

lowing week." The assessor then expresssed his obligation to Mr. Mills, and speaking to the under-sheriff, talked of giving twenty-four hours notice.

Argument for the petitioners.

The substance of the argument in behalf of the petitioners, was as follows:

The only complaint made by the petitioners on the present occasion, is, that the poll was prematurely closed. It is not intended to impute any criminal or improper motives to the returning officers in so doing, but merely, that they have not exercised a sound and proper discretion; it is not denied, that there is a certain degree of discretion vested in the returning officers, but it is contended that in this, as in other cases, where discretion is entrusted, it is meant to be a sound discretion; and that the committee must, as a court of law would, investigate whether a sound discretion has been exercised. This point arose in the case of *Rochester* (1), where it was admitted on both sides, in argument, "that the poll ought, in every instance, to be kept open till it is fairly to be presumed, that all the electors, or at least such as intend to poll, have given their votes; also, that the 25 Geo. III. c. 84 (2), merely restricts the duration of elections, so that they shall not last above fifteen days, but that within that time it leaves the common law to operate as before the statute. That electors, not being compellable to give their suffrages at any particular time, it must be left to the discretion of the returning officer to determine, what time he will allow towards the end of the poll, for taking the remaining votes. That the question was, whether this discretion had been properly exercised." So, in the present case, it is not contended that the 25 Geo. III, entitles a party to keep open the poll for fifteen days. The question is, have the returning officers exercised a proper discretion? It is contended they have not. Sometimes, contests are carried on by contending candidates, who appoint their own committees, and act as one common party; and all persons supporting a

(1) 2 Roe, 452, Sed vide Male, Appendix 140.

(2) 25 G. 3, c. 84, vide note 1.

particular candidate, co-operate with, and act under his directions.

The electors also sometimes take the affair into their own hands, and return whom they please, whether he be a candidate or not; and not only is it the privilege of electors to return whomsoever they please, but the person so returned, is bound to serve them. This distinction is material in the present case; because there is this difference, that in a contest of the first description, a consent by a party to any particular act, such as closing the poll, &c. may be important, whereas in the other case it would be of no avail, no one being competent to consent for another. In the case at present under consideration, the contest must be looked upon as that of the electors; for although a committee of the friends of Colonel Baillie had once met, with a view to secure his return, yet, subsequently, Colonel Baillie had himself declined coming forward, and his friends had dispersed. It was in consequence of the meeting on Brandon Hill, which took place after Colonel Baillie had resigned, and his committee had broken up, that he was put in nomination. The Guildhall committee, of which Mr. Stocking and Mr. James Mills were members, arose entirely out of the meeting on Brandon Hill, and was unconnected with that which re-assembled at the Bush; they had different houses open, and different agents; none of these gentlemen had any connexion with Colonel Baillie, and could not in any wise be considered as his agents, as the whole contest arose entirely out of the spontaneous exertions of the electors themselves, Colonel Baillie never having attended the hustings, nor taken any part whatever in the election.

On the last day, the poll was closed two hours earlier than on the former days; and during the last hour, nineteen voters polled, and during the preceding one, twenty-seven. The right of voting is widely extended at

Bristol, and out of 6,000 voters, 2,000 are estimated to be non-resident. In 1784 upwards of 6,000 polled, and in 1812 more than on the present occasion; neither is there any instance where there has been a full polling, in which the poll was closed nearly so soon as on the present occasion. At the two elections in 1812, it was kept open, one, thirteen days, and the other, ten, though one of the candidates resigned the eighth day. Before the 25th of Geo. III, the contests were of much longer duration, as 19, 21, 24, and 31 days. A voter has a right to vote, unless precluded by some act of his own, and ought not to be excluded by the returning-officer. The returning-officers have no right to say, whilst voters are coming in *bonâ fide* to poll, and not for the purpose of vexatious delay, that unless they come in within such and such hours, they shall lose their franchise. In the present case, it was a matter of great uncertainty, whether there would have been a contest, and it was not to be expected that out-voters should come on an uncertainty. The notice also was very short; the meeting on Brandon Hill took place only on Saturday, the nomination on the Tuesday, and the final close of the poll, at four o'clock on the Saturday following. The out-voters had no reason to conclude, that the election would terminate so soon; neither are they bound to come at a moment's notice, they ought to have a reasonable time allowed them to exercise their franchise. It should also be recollected, that although the contest terminated on the fifth day, the poll was kept open forty hours, a very unusual length of time, and during which period, an unusual number of voters polled. It was not till 1812 that there had been four places for polling. The proceedings on the part of the returning-officers were quite extraordinary; on the Friday, the day on which the first notice that the poll would close was given, 711 voters polled: Was there any thing then in the history of former elections, which warranted the re-

turning-officers in giving such an intimation? Quite the reverse. But what answer does this intimation of the returning-officers receive? Why that there were still 2,000 voters unpolled, and that if they closed the poll, it would be at their own peril. Application was made to supposed agents of Col. Baillie, but the answer was, that they were not agents of Col. Baillie; but, if of any one, of the electors, over whom they had no control, and for whom they had no authority to make any engagements, and this, accompanied by protests on behalf of the unpolled burgesses against the poll being closed. Many out-voters resided in London, how could it be expected that they should have notice of this premature and unusual conclusion of the poll. If the poll had been vexatiously prolonged, the returning-officers would have been justified in closing it; but here it was a *bonâ fide* contest, honourably carried on, and well supported. On Saturday, which was market-day, the poll did not decline, on the contrary, it improved; more polling the latter part of the day than the beginning. Many out-voters were prevented polling, some coming too late on Saturday, and others not arriving till Sunday, Monday, and the beginning of the week. Although the committee at the Bush was dissolved, for the second time, on the fourth day of the poll, yet the committee at the Guildhall, which originated from the meeting on Brandon Hill, in consequence of which Col. Baillie was put in nomination, continued unremitting in their exertions till the last. Many persons demanded to poll whilst proclamation was making, and were refused; and one gentleman told the returning-officer, that although the committee, of which he had been a member, was dissolved, yet that, at the time of their dissolution, their table was covered with letters from out-voters, promising to come in to poll, the beginning of the next week. It cannot be contended, that the proclamation of a returning-officer to voters to come in, and poll before a

certain hour, can have the same weight as an act of parliament. If the statutable time is run out, and a voter neglects to come in and poll before three o'clock on the 15th day, it is his own fault if he is deprived of the opportunity of exercising his franchise. If the proclamation of the returning-officer had the same effect, it would be in his power, by proclamation, at any time, to defeat electors of the exercise of their franchise. In the *Rochester case*, the only question was, whether the poll had been prematurely closed, and the committee determined that the poll had been prematurely closed. In that case, the total number of electors was 978, of whom 814 had polled; and of the 164 that remained unpolled, nine only were known to be living in the town, 27 only within ten miles, 61 were disqualified, and 52 either dead or abroad, and 15 of whom no account was given. On the first day, 277 polled; on the second, 337; the third, 95; fourth, 46; fifth, 15; sixth, 8, seven for one candidate, and one for the other; and on the last day, 36, of whom 23 were committee men, who generally bring up the rear. In that case it had not been usual for the election to last so long. The committee determined that the poll had been improperly closed. How does that case apply to the present, there the number of electors was upwards of 900, in the present, upwards of 6,000; in that case the poll was kept open for a period unusually long, in this, for one unusually short. In the case of *Rochester*, the candidate protested against the poll being closed, stating, he had voters enough coming up to turn the numbers in his favour: in the present, the electors protested, saying, 2,000 electors are still unpolled, and many out-voters have written to say, that they are coming in the beginning of the week to vote. It is also to be recollected that on the last day but one, the proportionate numbers for Colonel Baillie were considerably increasing, a favourable sign at that period of the election, and with a mi-

nority only of 500, two thousand being still to poll. So that where so much is in the power of the returning-officer, their conduct must be strictly watched and inquired into. Under all these circumstances, the committee cannot but decide, as it was decided in the case of *Rochester*, that the poll has been in the present instance prematurely closed; and, by such decision, protect voters in the fair exercise of the elective franchise, and not allow it to be defeated, by the hasty or ill-advised act of a returning-officer.

Argument for the sitting member.

The counsel for the sitting members argued as follows: There is a great difference between the present case and that of *Rochester*, as in that case, the majority was only two, whilst in the present it was 500. In that case too, the candidate protested, saying, he had voters enough coming up to turn the balance in his favor, when in this case there was no such assurance given, it was merely said, that 2,000 voters had not then polled; which declaration, was mere assertion, for which no authority was given; for, although in 1784, upwards of 6,000 might have voted, yet at the next full contest in 1812, when the poll was kept open ten days, only 4,389 voted, that was more probable to be near the real number of voters, than any record of those who voted in 1784; at all events, it was a fact on which the returning-officer might and ought fairly to exercise his judgment, when the statement, that, great numbers remained unpolled, rested merely on conjecture. Only 268 more polled in 1812, when the poll was open ten days, than did in 1818, when it was open only five. What was there in that circumstance, to raise a probable inference, that there were many more who wished to poll, or at least any number that could materially alter the place of Colonel Baillie on the poll, when at that time his minority below one candidate was 1,200; and below the other, 500. It is admitted, that if either a candidate, or the friends and agents who undertake

the cause of a candidate, retire, that the returning-officer may close the poll. In this case, the committee at the Bush, had dissolved and given up the cause, and of this fact, the returning-officer was informed by one of that committee; but then it is said, the committee at the Guildhall had not relaxed in their efforts, nor abandoned the hope of success. What answer however, does the assessor get, when he applies to that committee for a guarantee, that they had still a considerable number of voters to poll? Why, he is told, that they can give no guarantee, and that they have no control. It is not contended, that the returning-officer is bound to keep open the poll fifteen days; but, that a discretionary power is vested in him to say, under what circumstances it may be closed short of that time. Where then is he to look for materials, on which to found the exercise of that discretion, but to the state of the poll, and that he finds declining and nearly exhausted. Nothing can turn on the refusal of the two votes as the poll was closing. It has not even been attempted to show, that those voters had not had an earlier opportunity to vote; on the contrary, one is stated to live in, and the other near, Bristol. If such a circumstance alone were sufficient to defeat the return, any person so disposed, by judiciously feeding the poll, may, with very few votes vexatiously keep the poll open in any case, the whole fifteen days. It is true, that thirty-eight persons voted for Colonel Baillie the last day, but no inference in favour of his ultimate success can be drawn from that circumstance, as the other two candidates polled double that number. The question is, have the returning-officers exercised a fair and sound discretion?—It is contended, that every circumstance shows they have. Much has been said about the out-voters being deprived of an opportunity of exercising the elective franchise. This is the petition of the electors; but who are the petitioners, who

sign the petition? Not the out-voters who have been deprived of their franchise, but eighteen persons living in and near Bristol, who have polled, and one out-voter only from London, who waited five days before he came down to poll. It is therefore contended, that no circumstances have been adduced before the committee, to warrant the petition these parties have presented, and therefore it is hoped, the committee will vote it, frivolous and vexatious.

The committee resolved, that the sitting members were duly elected. Resolution.

That the petition did not appear to be frivolous or vexatious.

Mr. Palmer, the under-sheriff for the city of Bristol, was called to produce the poll. He stated, that there were four places at which the poll was taken;—that he was present during the whole election, and took the poll at one of the places himself;—that the poll was taken at the other three places by his son, his partner, and his clerk;—that the books he had to produce were the same which were given to them to take the poll in;—that he collected and cast up all the polls every evening, as under-sheriff;—that he collected and kept the different poll-books in his custody each night, and gave them out to the same persons, who were the sworn poll-clerks, every morning; and that, at the close of the poll, he collected the different books, and declared the numbers. Proof of the poll.

Mr. Warren objected to the poll being received in evidence, it not being sufficiently identified; and argued, that the circumstances of this case were similar to those of *Limerick* (1), where the committee had refused to receive the poll in evidence. In that case, the town-clerk did not take the poll; in the present, it was taken at four different places, by four different persons; and therefore, the under-sheriff, who produces it, can only authenticate that one of the four books which he took (1) Post, p. 89

himself; and it is just as necessary that one part of the poll should be properly authenticated, as another. All the under-sheriff knows, is, that he saw the different persons taking the poll, and that he took care of the books at night; he is not competent to explain any entry in those books, the poll-clerks themselves are the only persons who can do that. In the case of *Limerick*, the town-clerk was thought the proper officer to have the custody of the poll; it was given to him at the close of the contest, sealed up, by the returning-officer, who received it at the close of each day's poll, from the poll-clerk:—The facts, therefore, are nearly the same in both cases; and, in that of *Limerick*, the poll was rejected, because the poll-clerk was not produced, who was the best evidence to authenticate the poll. That, if caution was necessary in any case, it was particularly so in the present; as, from the opening, it would appear, that not only the day, but the hour, at which an elector polled, might be a matter of consequence.

Vide *Chester*, ante. *Limerick* and *Drogheda*, post.

The committee determined, that the poll-books should be received in evidence.

CASE VI.

CITY OF LIMERICK.

The Committee was appointed on Tuesday, the 25th of February, and consisted of the following Members:

Sir Thomas Baring, Bart. (*Chairman*).	Rich. Hanbury Gurney, Esq.	
Sir George Staunton, Bart.	Earl of Euston.	
Sir Charles Mordaunt, Bart.	Charles Palmer, Esq.	
Cuthbert Ellison, Esq.	John Maberley, Esq.	
Pryse Pryse, Esq.	William Astell, Esq.	
John Wynne Griffiths, Esq.	Nicolson Calvert, Esq. for the Petitioner.	Nominees.
Lord Viscount Weymouth.	Right Hon. J. M. Barry, for the Sitting Member.	Nominees.
Joshua Walker, Esq.		

Petitioner: Thomas Spring Rice, Esq.
Sitting Member: Hon. John Prendergast Vercker.
Counsel for the Petitioner: Mr. Warren and Mr. Rolfe.
Counsel for the Sitting Member: Mr. Harrison and Mr. Puller.

THE committee did not enter into the merits of this case, being of opinion, that the preliminary objection, taken on behalf of the sitting member, to the production of the poll was valid.

Facts of the case.

Mr. Edward Parker was called to produce the poll, who stated, that he was both town-clerk and clerk of the peace, for the county and city of *Limerick*, in which capacities he attended at the last election. That the sheriffs are the returning-officers, and that from one of them he received the poll, a few days after the termination of the election. That the poll-book was sealed up in a parcel, when he received it; and that it has continued so, in his possession, ever since.

Objection.

For the sitting member, it was objected, that the poll could not be received, on the ground, that there was not sufficient evidence before the committee, to show that the poll proposed to be produced by the town-clerk, was the poll taken at the election. The argument was, in substance, as follows: Before a poll can be received in evidence, the committee must be satisfied that the poll produced is the same that was taken at the election. From the evidence, it appears, that the town-clerk does not speak to the identity of the poll; all he knows is, that he received a sealed parcel from one of the returning-officers, purporting to contain the poll taken at the last election. The poll-clerk himself is the proper person to authenticate the poll; in the late case of *Chester* (1), this point arose, and was much argued; but before the committee decided, the poll-clerk was produced. It is a settled point, that the poll must be produced before a committee can proceed with a case (2); and this preliminary step is equally necessary, although the object is only to obtain a commission to take evidence in Ireland (3). In the *Dungarvon case* (4), the poll was produced by the clerk of the peace, who stated, that he had received it from the assessor; and there the committee were of opinion, that the poll was not properly authenticated, and resolved, that "having been of opinion, that sufficient legal proof had not been adduced to establish the poll-books, the committee should not make an order for the nomination and appointment of commissioners."

Argument for sitting member.

(1) Ante, p. 72.

(2) *Newcastle under Lyne*, 1 Peck, 490.

(3) *Waterford*, 1 Peck. 236.

(4) 1 Roe, 711.

Argument for the Petitioner.

For the petitioner, it was argued as follows: The poll is sufficiently authenticated; it comes out of the proper custody; it is brought here by the town-clerk, and by him received from one of the returning-officers. In the case of *Dungarvon*, the poll was not produced by the proper officer. In that of *Chester*, the town-clerk did produce the poll, but it was not ascertained from whom he had received it. In the case of *Water-*

ford, cited on the other side, the order of the committee for the production of the poll was made on the town-clerk. In that of *Herefordshire*, the committee received the poll, although it was produced out of the custody of the under sheriff, instead of that of the clerk of the peace, pursuant to 10th of Anne. But the case of *Dublin*, 1806, is in point; there the poll was produced by the town-clerk, who received it from the returning-officer, as in the present instance, and the committee admitted the poll, and granted a commission; and in 1813, a committee, under similar circumstances, received the poll, and granted a commission in the case of *Galway* *. The committee resolved, "that there had not been sufficient evidence adduced to satisfy them, that the sealed up papers, purporting to be the poll-book of Limerick, were such." Resolution.

An application was made to the committee, on behalf of the petitioner, for an adjournment of ten days, in order that the poll-clerk might be produced; which was opposed by the sitting member, and negatived by the committee. Adjournment requested, refused.

It was proposed on behalf of the petitioner, to show, by parol evidence, that there had been an election, and that the petitioner was a candidate, on the following grounds. The only object for which the poll is wanted, at present, is, to show that there has been an election, and that the petitioner was a candidate; because, that being proved, our next step would be to pray a commission to take the evidence in Ireland, when it will be competent for the commissioners to see that the poll is properly authenticated, before they proceed with the Parol Evidence offered. Argument, petitioner.

* The cases of *Dublin* and *Galway* were cited from the Minutes of the committee, neither being in print. The proof in the *Dublin case*, appears to have been weaker than that offered on the present occasion, for there the poll was stated to have been delivered by the returning-officer, at the town-clerk's office, to his clerk, who placed it in a desk, of which he kept the key himself.

case. This circumstance makes a distinction between the present case, and that of an English petition, where the committee must proceed immediately with the case. We are prepared to prove, by parol testimony, that there was an election, and that the petitioner was a candidate. The poll certainly is evidence of these facts, but it does not follow that it is the sole evidence.

Argument for the sitting member.

To this it was objected, for the sitting member, that where an election is contested, the law directs that a poll shall be taken down in writing; the poll then becomes the best evidence, in which case, parol testimony cannot be received; and that the committee are equally bound to see, that these facts are proved by proper evidence, as any other facts that may arise in the hearing of the case.

Rejected.

The committee resolved, "that in the absence of the poll-book, parol evidence could not be admitted, to prove that the petitioner and the sitting member were candidates."

Committee refuse to open the sealed parcel.

It was also proposed, that the sealed paper should be opened before the committee, to ascertain if the sheriff's attestation was attached to it; this also was objected to, and the committee resolved, "that the books which were delivered in and sealed up, could not be opened, to prove the attestation of the sheriff."

The committee resolved, that the Hon. Prendergast Vereker, was duly elected. That the petition of Thomas Spring Rice did not appear to be frivolous or vexatious. After these resolutions had been reported to the House, it was "ordered, that Minutes of the Proceedings be laid before the House."

Votes March 1, 1819.

CASE VII.

THE BOROUGH OF DROGHEDA.

The original order for considering the Petition in this case, stood for Tuesday, the 11th of March; that order, however, was discharged, and it was directed to be taken into consideration on Tuesday, the 27th of April 1819, when the Committee, consisting of the following Members, was chosen:

Hon. Thomas Brand, (*Chairman.*)	—— Kiely, Esq.	
Sir Thos. Mostyn, Bart.	March Phillips, Esq.	
Joseph Pitt, Esq.	D. S. Dugdale, Esq.	
W. H. Scourfield, Esq.	Robert Williams, Esq.	
Sir Peter Pole.	C. Shaw Lefevre, Esq.	
James Blair, Esq.	C. W. Wynn, Esq. for the Petitioners.	Nominees.
John Carroll, Esq.	Sir John Stewart, for the Sitting Member.	Nominees.
John Martin, Esq.		

Petitioners: Electors.
Sitting Member: Henry Meade Ogle, Esq.
Counsel for the Petitioners: Mr. Warren and Mr. Harrison.
Counsel for the Sitting Member: Mr. Serjeant Pell and Mr. Harris.

THE Petition stated, that at the last election for a member to serve in parliament for the county of the town of *Drogheda*, many persons were admitted to vote for Henry Meade Ogle, Esq. the sitting member, "who never had been admitted to their freedom, and many whose alleged admissions, or any entry, minute, &c. were never entered on stamped paper or parchment as required by law; and many, who by reason of non-compliance with the provisions in other respects of the stamp acts in force in Ireland, were not qualified to vote, Petition.

and ought not to have been admitted to vote; and many, who were in other respects disqualified by law, for voting at said election. That many persons were permitted to vote at said election, without giving any legal evidence of their right to vote, though such evidence was required by the said Mr. Wallace and his agents; and in consequence of such legal evidence not being given previously to their so voting, the petitioners were, during the poll, and until lately, kept in ignorance of the objections which lay to many of the persons, who were so permitted to vote as freemen for Mr. Ogle:—That many persons were permitted to vote as freemen for Mr. Ogle who never had taken or subscribed the freeman's oath, or the other oaths necessary to be taken by freemen, before a proper officer, or person authorized to administer the said oaths:—That many persons, whose freedom had not come to them by service, birthright, or marriage, were admitted to vote at said election, and did vote, though they were not admitted to their freedom six calendar months before the *teste* of the writ for holding such election, contrary to the statute in such case made and provided:" that by these means Mr. Ogle had obtained a colourable majority on the poll. This petition likewise contained a charge of bribery against Mr. Ogle, and also complained, that the freedom of election had been violated, by the unnecessary display of a strong military force during the election; and as another ground of complaint, stated, that freeholders, not duly registered, had been admitted to poll for Mr. Ogle; and that others, who were duly registered, and had tendered for Mr. Wallace, had been rejected. On the three last heads of complaint, no evidence was offered before the committee, but they were reserved for investigation before the commissioners in Ireland.

Production of the poll.

The first question in this case arose on the production of the poll.

Mr. Samuel Fairclough was called, who stated, that he was senior sheriff, and returning-officer, at the last election for the town of Drogheda:—That the election lasted several days, and that he received the poll book each night from the poll clerk, and gave it to him again the next morning:—That as soon as the election terminated, he declared Mr. Ogle, duly elected, and signed the poll, and immediately gave it back to the poll-clerk (who scarcely kept it a day) to make some minor alterations in some of the entries. That he delivered the poll within the proper time at the office of the clerk of the peace, and that the poll, now produced by the clerk of the peace, was the same which he signed, and left at his office. Evidence.

Mr. Wm. Oliver Fairclough stated, that he was clerk of the peace and town-clerk for the town of Drogheda; and that he received the poll-book at his office, from his deputy, Patrick M'Kenny. That the election was in June and July; and that he went to England about the 26th of July, and did not return before the 7th of September:—That he received the poll from his clerk, a few days after his return, and kept it locked up, until he left it with his clerk for the use of the petitioner; and that his brother, Mr. John Fairclough, had it for two or three days, to fill up some blanks in the registration of the freeholds, in which he assisted him.

On behalf of the sitting member, it was objected, that the poll had not been properly authenticated, and consequently, could not be received in evidence. The substance of the argument was as follows: Argument for the sitting member.

It is true, the sheriff may have signed the poll; he is not, however, competent to prove the contents of it; neither does it appear from his evidence, that the poll is in the same state as when he signed it; on the contrary, it appears he returned the poll to the poll-clerk, after he had signed it, for the express purpose of making alterations. It is necessary in Ireland, that the poll

should be signed by the sheriff, to be properly authenticated; then, if alterations are subsequently made, his signature goes for nothing. This case is one, therefore, in which peculiar accuracy of proof is necessary, because, allowing the alterations to have been *bonâ fide*, still those alterations are unauthenticated by the sheriff. It is also to be recollected, that the sheriff did not give the poll to the clerk of the peace himself, nor has it always continued from that time in his custody, but has even undergone subsequent alterations. It is not the cover, but the contents of the book, which are to be authenticated. The poll-book is to be taken as *primâ facie* evidence of what passes at the election, this avowedly contains something more, and if so, the whole falls to the ground. If A. give a bond to B, and an alteration is proved to have been made in it after signature, that bond could not be received in evidence, until it was shown that such alteration was made by A; so, in this case, it is necessary to show, under what circumstances, and by what authority, the alterations have been made. It is also submitted, that this poll-book can not be received in evidence, unless the poll-clerk himself is called to authenticate it.

Argument for the petitioners.

For the petitioners it was contended, that the question is, not whether every entry in the poll-book is correct; but, whether the book produced is the original poll? and that it was not necessary to call the poll-clerk to prove that fact. That inaccuracies might creep into any poll-book, and if discovered, might be explained; but if any objection was to be made on that account, it must be made at a subsequent stage of the proceedings, as the question might arise on the consideration of any particular entry; for it was sufficient, in the first instance, to show, that the poll now produced by the town-clerk, was the same poll which the returning officer received from the poll-clerk, at the close of the election, to which he had affixed his signature, and which he, subsequently,

delivered himself, at the office of the town-clerk, who was the proper officer, to have the custody of it.

Resolution. Vide *Chester, Bristol, and Limerick*, ante.

The committee resolved, that the poll should be received.*

When the poll was received, the counsel for the sitting member proposed to inquire what alterations had been made; to which it was objected, on behalf of the petitioner, that such enquiry could be entered into, only where an objection arose to any particular entry.

Alteration of the poll.

The committee resolved, that the counsel for the sitting member should not then examine into particular entries, but that they were at liberty to enquire, generally, whether alterations had been made.

Decision.

One of the grounds of complaint stated in the petition was, that many persons had been permitted to poll for Mr. Ogle, who either had not taken the freeman's oath, or, who had not taken it before a proper officer. The first objection on this division of the case arose on the vote of the Rev. Mark Wainwright. It appeared that

Swearing.

Rev. Mark Wainright's vote.

* The petitioners in this case, were prepared with the further evidence of the poll-clerk; and it was at the request of the committee, that the question of admissibility was argued at the present stage of the evidence. The decision in the late case of *Limerick*, probably gave rise to this desire on the part of the committee; particularly, as in the subsequent case of *Bristol*, the committee came to a resolution, somewhat trenching on that decision. The poll, taken by the poll-clerk of the returning-officer, is a public document; it would, therefore, appear to be sufficient that it should be produced out of the proper custody, and be shown to have been made by the proper officer, without requiring that extreme proof which is necessary to give authenticity to deeds or documents of a private nature. In the case of Irish petitions, where a commission issues to inquire into the evidence in Ireland, it seems a hard case that parties should be put to the expense of identifying the poll before the committee in England, when, perhaps, (as was the case in the *Limerick* petition) the only point to be proved before the committee, was, that there had been an election, and that the petitioner was a candidate. This evil, however, has been pointed out, and probably, will not be one of future occurrence, as a bill has been brought in during the present session, and is now before the House on the subject.

Sworn at the hustings by the town-clerk.

the freeman's oath was administered to this gentleman by the town clerk, on the hustings, during the election.

Argument for the petitioners.

For the petitioner, it was objected, that, in this case, the oath had not been properly administered, as all persons sworn in before the town-clerk *alone*, whether at the hustings or elsewhere, were improperly sworn.

Mr. Oliver Fairclough stated, that he had been town-clerk of Drogheda since 1812, during which time he had always administered the freeman's oath. Sometimes he had sworn in freemen before the mayor at corporate meetings, or when the mayor was sitting at the Tolsil; some he had sworn at his own house, several at the hustings, and two in the news-room.

The substance of the argument for the petitioners was as follows:

A freeman must be sworn in, before he can exercise the elective franchise; and no oath can be valid, unless taken before a competent officer. If a person act as a freeman before he take the oath, he cannot afterwards take it; but he is guilty of an usurpation, and is ousted of his freedom. Not only must a freeman be admitted by the corporate body, but the swearing in, though a ministerial act, must take place in the presence of the proper corporate authority. In the *Cardigan case*, of 1813, it appeared in evidence, that many of the voters had been sworn in by the town-clerk, some at a public-house, others in the street; and the committee then held such swearing to be defective. How a freeman is to be sworn, may depend upon the constitution of the particular corporation under which he claims. It is not contended, that it is necessary a freeman should be sworn in at a corporate meeting; but that the town-clerk, when he administers the oath, must be sanctioned by the presence of the proper corporate magistrate; and that, in no case, can the town-clerk of himself be competent to administer the oath. If the charter be silent

R. v. Healle, 1 Str. 281.

This case is not reported.

on the subject, the inference would be, that the oath ought to be taken before the mayor.

Argument for the sitting member.

For the sitting member, it was contended, that it must be presumed, a freeman has been properly sworn in, till the contrary is proved. The evidence is, that since Mr. Fairclough came into office in 1812, he has been in the habit of administering the oath to freemen, unaccompanied by any other corporate authority, believing himself competent; and no evidence has been adduced to show, that a contrary usage existed prior to that period, neither has fraud nor unfair dealing been imputed. It is true, a corporation cannot make a bye-law to regulate the swearing in of freemen; but the charter may direct how the oath is to be administered. Drogheda is a chartered corporation; why then has not the charter been produced, to show that the voter in question has been improperly sworn in?—then, in the absence of all evidence to the contrary, it must be presumed, that the oath has been properly administered. It has been admitted, that it is not necessary the swearing in should take place at a corporate meeting; and the usage being, that the town-clerk has sworn in the freemen, unaccompanied by any other corporate authority, the committee cannot presume that he has exceeded his authority.

Resolution not sufficient.

The committee resolved, that "freemen sworn in by the town-clerk, unaccompanied by any other authority, are not entitled to vote as freemen of the borough of Drogheda." The committee held this resolution to apply to the vote of Mr. Wainwright.

Mr. R. B. Warren's vote.

Sworn in at the hustings.

It was stated, that the freeman's oath was administered to Mr. Warren, by the town-clerk, at the hustings; it appeared in evidence, that the mayor and Mr. Evans, a chartered magistrate, were the persons appointed to administer the freeholder's oath.—That, at the commencement of the contest, they sat in the court where the election was going on, and, subsequently, in a little room adjoining,

Presence of the corporate magistrate sufficiently proved.

which had folding doors towards the court, which were constantly open.—That the town-clerk administered the oaths openly at the table in the court; and one of the sheriff's stated, that, when on the hustings, he could see the mayor and Mr. Evans administer the oaths to the freeholders in the adjoining room. The question raised for the consideration of the committee on this evidence was, whether, under these circumstances, the town-clerk could be considered as having been *accompanied by any other authority* at the time he administered the oaths to freemen at the hustings.

Argument for the petitioners.

For the petitioners, it was contended as follows:—In the eye of the law, it is the presiding magistrate who administers the oath; but, from the evidence, it appears, that, in this case, neither the mayor nor Mr. Evans could have any knowledge of what was taken place at the hustings, as they both had a separate and distinct duty to attend to in an adjoining room, it does not even appear that their attention was called to the subject; on the contrary, the town-clerk has stated, that he administered the oaths (as he conceived he had a right to do) upon his own authority. If it be necessary that any act to be valid should be done in the presence of a magistrate, it must be presumed that such magistrate is cognizant of what is taking place.

The substance of the argument for the sitting member was as follows:—

Argument for the sitting member.

The question is, whether, at the time the town-clerk administered the freeman's oath to Mr. Warren, there was any magistrate present? If any presumption is to be raised, it must be in favour of their presence, as the committee cannot presume that the oaths were illegally administered; but it appears, that both the mayor and Mr. Evans must of necessity, from the nature of their occupation, have been constantly present. It cannot be contended, that they were ignorant of what was taking place, because, it appears, that the oaths were ad-

ministered to the freemen openly in court, and within their view; consequently, if they did not dissent, they must be considered as assenting to that act of the town-clerk. In courts of justice, when persons are sworn, either to affidavits, or as witnesses to give evidence before the court or the grand jury, the presiding magistrate gives no immediate and particular authority to the officer whose duty it is to administer the oath; it is the presence of the magistrate alone, which gives legality to the act of the officer.

Resolution

The committee resolved, "That the town-clerk of Drogheda, when he administered the oath to Mr. Warren, was accompanied by a competent authority."

The chairman intimated, that the committee came to this resolution, considering that the mayor and Mr. Evans were virtually present whilst the oath was administered to Mr. Warren.

It was now contended, on behalf of the petitioners, that all voters who appeared to have been sworn at the hustings, must be considered, *primâ facie*, as coming under the first resolution of the committee, unless it was first shown, that either the mayor or Mr. Evans were present at the time they took the oaths. The committee, however, resolved, that those freemen who were sworn in by the town-clerk in court, should be received as properly sworn.

Owen Armstrong's vote.

Evidence of swearing, what?

Book entitled, "A List, &c."

Mr. Fairclough, the town-clerk stated, that there were two books belonging to the corporation, in which the admissions of freemen were entered: one, entitled "The Acts of the Assembly;" and the other, "A List of names of the Freemen of Drogheda, when admitted and where sworn." That the admissions of freemen are recorded in the first-mentioned book, among the acts of the quarterly meeting, at which such admissions took place;—which proceedings would be headed as follows: "At a general assembly, held before William Ogle, Esq. mayor, A. B. and C. D. sheriffs, E. F. &c. aldermen, &c.

&c." That he enters the names and admission of freemen in the book, entitled (A List of the Freemen,) from the original petition and grant. That this book is treated as a corporation book, and is referred to when a petition is presented, claiming the freedom by birth, to ascertain whether the father of the party petitioning is a freeman; and that it came into his hands, together with the rest of the corporation papers, from the custody of his predecessor, Mr. Holmes. This book purported to contain a list of the freemen of Drogheda, from 1690 down to the present time; but from 1690 to 1773, all the entries appeared to be in one handwriting, as if copied at the same time into the book. In the book entitled, "The Acts of the Assembly," there were some entries of admission which recorded, both the admission and swearing of the freemen:—For instance,—"David Jebb, of Slane, admitted and sworn on petition, by special favour;" others, the admission only, as, "13th of July, 1810, Owen Armstrong admitted a free member, by special favour, on the usual terms." Mr. Fairclough explained the usual terms to be, payment of a fine of 20*s.* to the corporation, the usual fees of swearing and taking the freeman's oath. In the book entitled, "A List, &c." was the following entry, "1359, Owen Armstrong, of Gormanston, green-linen-bleacher, admitted by special favour, 13 July, 1810; sworn, 1st of Sept. 1810." The vote of Owen Armstrong was objected, on the ground, that he had never taken the freeman's oath; and the last mentioned entry was offered as evidence of his having been sworn.

Argument for the petitioner.

For the petitioner, it was argued as follows: The acts of the assembly must be taken as the original records of the corporation. The book entitled "A List, &c." cannot be considered in that light; it is no more than what it purports to be, a mere index, made for the use of the corporation, and in no other sense a

corporation book than as being their property. If the admission or swearing of a voter is disputed, the records of the corporation are the best evidence to apply to; and turning to the entry of Mr. Armstrong's admission on those records, it merely appears that he was admitted: and no entry from that book has been produced to show, that he was ever sworn. It is not necessary, at present to argue, what weight would be given to this List, supposing the original records of the corporation were lost; but it is contended, as those records are still in being, that no other evidence can be received, either to contradict or amend them; and, consequently, that there is no evidence before the committee, of the swearing in of Mr. Armstrong.

Argument for the sitting member.

For the sitting member, it was contended, that the book entitled, "A List, &c." ought to be considered as a corporation record; and that it would be good evidence against the corporation on a *quo warranto*, it having been proved to be used by them as such; and also, that it had been transmitted with the rest of the corporation papers, by the former town-clerk, to the present officer. That this entry was not offered to contradict the records, but as evidence of a circumstance of which no mention was made in the records. If the entry on the records had been merely, that Owen Armstrong was admitted, would the committee, therefore, presume, that he had left his title incomplete, and never perfected it by taking the necessary oaths? The contrary would be the presumption; and this entry is offered in evidence, to strengthen that presumption, which the law would raise in favour of the voter's title.

Resolution. Books entitled, "A List, &c." no evidence.

The Committee resolved, "That the book containing the list of the names of the freemen of Drogheda, shall not be received as evidence of swearing in."

The agents of the respective parties were now directed to search through the acts of the assembly, and to produce the admissions of such voters, as appeared

by the entries to have been sworn. The next morning the agents stated, that they had searched from the year 1761 down to 1810; that between 1761 and 1780, they had found several entries of admissions, where it appeared the persons admitted had taken the oaths, but that from July 1779 to June 1810, there was no entry of the swearing of any freeman.

It was contended on behalf of the petitioners, that the votes of all those freemen who did not appear, from the acts of the assembly, to have been sworn, must be struck off the poll, unless the sitting member was prepared to establish the fact of swearing, by some other evidence.

For the sitting member it was argued as follows:—It has been shown in evidence, that for the space of thirty years, there is no entry to be found of the swearing in of a freeman among the entries of the acts of the assembly, and, that during that time, it can be proved from other sources that many freemen who are there entered as admitted, have taken the oaths. It cannot, therefore, be argued, that a person is not sworn, because no entry of his having been sworn appears on the corporation records. Then if the silence of the records ceases to be negative evidence, the case is altogether without evidence, and then the law will presume that what ought to have been done has been done. A charter or a grant have been presumed (1). The law also presumes that where a duty is cast upon a man, that he performs it, unless the contrary can be proved (2). The committee, therefore, must presume *primâ facie*, that all those freemen, whose names are entered among the acts of the assembly as admitted, have been sworn, unless evidence is produced to show the contrary.

(1) *The Mayor of Kingston upon Hull v. Horner*, 1 Cowper, 102.

(2) *Monck v. Buller*, 1 Roll, 83.

To raise this presumption, the counsel for the sitting member then proposed to give, in evidence, the stamped admission of another voter, containing an attestation of his having taken the oaths, under the corporation seal,

and signed by the town clerk; and further to show, that the entry of that voter's admission in the acts of the assembly, was in the same terms as that recording the admission of OwenArmstrong. This evidence was offered to strengthen the presumption, that Owen Armstrong had taken the oaths, and also to negative any presumption arising to the contrary, from that fact not having been recorded in the entry of his admission.

This evidence was objected to on the part of the petitioners as irrelevant.

The committee resolved, "that they could not receive the certificate given to Mayne as evidence, in support of Armstrong's vote."

Mr. Philip Hendleton's vote.

In this case, the entry among the acts of the assembly, was as follows:—"26 April 1811, Philip Hendleton, jun. eldest son of Philip Hendleton, esq. is admitted a free member, by birth, on the usual terms." A certificate also under the corporation seal, was produced, in these terms: "Be it remembered, that at a general assembly, Philip Hendleton, jun. took the usual oaths, and was admitted."

Corporation Seal. Signed by the Town-clerk.

For the petitioners it was objected, that this certificate could not be received as evidence, that Philip Hendleton had been legally sworn, because the committee had decided, that where the town-clerk had administered the oaths, unaccompanied by any other authority, that it was not sufficient; consequently, the certificate did not prove enough, for it did not mention where or in what manner the oath had been administered.

The committee resolved, "that Philip Hendleton was regularly sworn in a freeman of Drogheda."

Mr. Henry Pentland's vote.

No entry was produced from the acts of the assembly, to show that this voter had been sworn; but it appeared in evidence, that in 1799 he had served the office of

Service of a corporate office evidence of swearing.

sheriff of Drogheda, and subsequently, that of mayor; and that he would have been incapable of filling either of those offices, unless he had been a freeman, and had taken the necessary oaths. The Mayor is chosen out of the body of aldermen, the aldermen from the sheriffs peers and common council-men, who are selected from the freemen. A sheriff's peer, is one who has served the office of sheriff. A freeman refusing to serve the office of mayor, incurs a fine of 200 *l.*; that of sheriff, 100 *l.*

Argument for the sitting member.

For the sitting member it was not contended, that this was direct evidence to show that Mr. Pentland had been properly sworn in a freeman, but that it was strong evidence to raise the presumption, that he had been so sworn.

Argument for the petitioners.

For the petitioners, it was argued, that this evidence did not carry the case any further; that it could not be received as evidence, that the voter had been regularly sworn; and if offered on the trial of a *quo warranto*, would be rejected. In the first instance, the committee were requested to presume, that a voter had been regularly sworn; now they are requested to presume, not only that he was regularly sworn, but that he had been both legal mayor and legal sheriff, or, in other words, that every thing that has been done has been well done.

Resolution.

The committee resolved, "that Mr. Henry Pentland appeared to have been regularly sworn in."

Under this resolution, service either of the office of mayor, alderman, sheriff, or common councilman, was received as evidence of swearing.

Wm. Furguson's vote. Stamps.

By an entry on the corporation records, Mr. Furguson appeared to have been admitted to his freedom, July the 17th 1807: the town-clerk also produced a certificate of his admission, on a proper stamp, which he admitted was made out a month after the election was over, prior to which period, Mr. Furguson's admission did not appear to have been entered on a stamp.

Objection.

On this evidence it was objected, on behalf of the

petitioners, that at the time Mr. Furguson voted, his admission did not appear to have been recorded on a stamp, which omission could not be supplied by any subsequent entry; and also, that the admission on stamp did not come within the provisions of 45 G. III,; which statute requires the stamped admissions of freemen to be affixed to the corporation records. The substance of the argument was as follows:

Argument for the petitioners.

A freeman must not only be legally admitted, but it is also necessary that he should have legal evidence of his admission, at the time he gives his vote (3). It is true, in some cases, stamps may be affixed subsequently to the date of an instrument, on payment of a penalty; but then the instrument must take its date from the time at which it was stamped. The committee must consider themselves as sitting in the situation of assessor at the election, and decide on the validity of each vote, as it would have appeared at that time. The stamped entry is the best evidence of a voter's admission, and therefore must be produced; but at the time Mr. Furguson voted, he had no such evidence of his admission. It is not denied that the corporation officer is now made liable for the amount of the stamps, on the admission of freemen; but that does not alter the case;—the corporate officer is made liable because he has the power to demand payment for the stamp from the freeman, when he admits him. This liability was created to protect the revenue from the negligence of corporate officers, not to lessen the evidence previously requisite, of a voter's title. The security against a voter is, that he cannot act as a freeman, without showing his compliance with the act of parliament, by the production of his admission, entered on a proper stamp. The case of *Rogers* v. *James* (4) does not apply, because, in that case, at the time the *cause was tried*, the letters of administration were properly stamped;

(3) *Cardigan*, 3Doug. 215. *R. v. Reeks*, Lord Raymond, 1445.

(4) 7 Taunt. 147.

but *R.* v. *Reeks*, does apply, and so does the case of *Cardigan*; for the non-evidence clause applies to all the stamp acts.

Argument for the sitting member.

For the sitting member, it was argued, as follows:—The only objection is, that Mr. Furguson's admission was not entered on a proper stamp at the time he gave his vote. The *Cardigan case* is one of some standing, and was decided, on an act of parliament, on which the present case does not depend. The 56th Geo. III, makes the corporate officer liable for the amount of the stamps required for those freemen whom he admits; it therefore becomes his duty to see that the entry of admission is made on a proper stamp. The parties now are, the Crown and the corporate officer; the voter, consequently, ought not to suffer for the negligence of a third person. No attempt has been made, to show that Mr. Furguson refused to have his admission recorded on a proper stamp; neither has any attempt been made to cheat the revenue, for an entry of the voter's admission on a proper stamp has been produced before the committee:—it appears, that Mr. Furguson has been well admitted, well sworn, and these facts recorded on a sufficient stamp. In the case of *Rogers* and *James*, it was objected, at the trial, that the letters of administration were not properly stamped, and the plaintiff was thereupon nonsuited. That cause was, subsequently brought to trial, when the same letters of administration were produced, properly stamped, when it was again objected they could not be received in evidence, having been originally improperly stamped, and the point was reserved. But the Court of Common Pleas held, that if the letters of administration were properly stamped at the time they were produced at the trial of the cause, they would not inquire when that stamp was put on. It is not necessary that the stamped admissions of freemen should be entered on the corpo-

7 Taunt. 147.

ration records. This question was discussed on the late case of *Evesham*, where the committee received many stamped admissions, which were kept together in a roll, but not affixed to any corporate book. Ante, p. 51.

The committee resolved, "That those persons, whose admissions were stamped after their votes had been given, could not be considered as legal voters."

Roll of stamps, admitted.

Mr. Fairclough, the town-clerk, proved, that he had kept the stamped admissions of many voters on a file, which he had subsequently sewn together in one roll. The committee resolved, "that the stamped roll produced by Mr. Fairclough, came within the provisions of the stamp act."

Mr. Charles Ball's vote. Service of corporate office, evidence of stamping.

It appeared, that this voter had been admitted 9th of October, 1807; but no stamped entry of his admission was produced. It also appeared, that, since that period, Mr. Ball had filled the situations of mayor, alderman, and sheriff. Service of either of these offices having been received as evidence of swearing, the committee were desired to extend that resolution, and receive it as evidence of stamping also.

Argument for the petitioners.

For the petitioners, it was contended, that service of a corporate office could not be received as evidence to raise the presumption, that the admission of the voter was entered on a proper stamp. It is true, that where a corporation acknowledge a person as acting as a corporator, that is evidence against the corporation; but where the question is, whether the entry of admission has been made on a proper stamp, the parties are different, for they cease to be the corporation and the individual, and become the Crown and the corporation. If such evidence be received, it would make the corporation give evidence in their own behalf, for they are now rendered liable for the amount of the stamps on which admissions ought to be entered. But this is not a case for presumption, because, if one stamp is lost, another

7 East. 45. ought to be obtained. The case of *R.* v. *Long Buckly*, does not apply, for there the whole instrument was lost; but, in the present case, there is an admission which is not stamped, and the committee are desired to presume the existence of another entry somewhere else on a proper stamp.

Argument for the sitting member. For the sitting member, it was argued, that the committee must raise the same presumption in favor of stamping, as they already had done in favour of swearing. It is equally necessary that a corporator should have his admission recorded on a proper stamp, as to be well sworn, before he can legally fill any corporate office; a presumption must be raised one way or the other, because the entry of the voter's admission contains no negative evidence to show that he had not been admitted on a proper stamp. Six years possession is sufficient to support the title of a corporator; in this case, we show possession for eleven years. If the voter in question has not filled the corporate offices legally, that question would involve the discussion of the corporate rights, which is one on which the committee have no jurisdiction. Though the law requires the best evidence to be produced, still, where it is satisfactorily shown, that the best evidence cannot be produced, then the next best is to be received.

In the case of *R.* v. *Long Buckly*, the sessions presumed, that an indenture of apprenticeship which had been made thirty years, and proved to have been lost, was properly stamped; although the deputy register, and comptroller of stamps, proved that there was no entry during that period at the stamp-office, that any such indenture had been either stamped or enrolled:— And that presumption was confirmed by the Court of King's Bench.

Resolution. The committee resolved, "that the vote of Mr. Charles Bell should stand on the poll."

Mr. Fairclough, the town-clerk, enquired of the Committee, whether he was bound to answer questions, in answering which, he may subject himself to pecuniary penalties? The committee decided, that if the penalty, likely to be incurred, was pecuniary only, that he was bound to answer. Evidence, Liability to pecuniary penalties not sufficient to excuse a witness from answering questions.

George and Edward Rotheram were sworn, one at the hustings, and the other at the town-clerk's house; both votes were objected to in the list of objected votes, as not having been properly sworn. The town-clerk could not say which he had sworn at the hustings, or which at his own house. For the petitioners, it was desired, that one of the Rotheram's should be struck off the poll, which was resisted by the sitting member, because they had failed to identify either as having been improperly sworn. The counsel for the petitioners then asked for time, to produce further evidence on this point, which was refused. Identity.

On the behalf of the petitioners, the committee were requested to allow a witness, who was included in the list, but whom it was not intended to examine on this part of their case, to be admitted into the committee-room, to assist in the preparation of their lists of the different heads of objected votes. Admitted.

Rev. Arthur, for Rev. Anthony Adams, admitted to be bad. Codrington, for Coddington, good. Misnomers.

Bitton John Foster, for Right Hon. John Foster, abandoned.

At the close of the day, on Monday, May 10th, the counsel for the petitioners stated, they should be ready to proceed with their case the next morning. On Tuesday morning, however, they stated, that they were not prepared to proceed; and asked the committee to grant a commission, to inquire into the remaining charges contained in the petition, pursuant to the notice given by the petitioners to the sitting member. On the behalf of the sitting members it was contended, that the The Commission.

committee could not now grant a commission, and it was argued as follows:

Argument for the sitting member.

Where it is the intention of the petitioners to ask for a commission to take evidence in Ireland, the statute requires a notice to be given to the sitting member, as soon as the petition is presented. In this case, the petition was presented on the 22d of January, and notice that a commission would be prayed, was not served on Mr. Ogle till the 25th, being an interval of two clear days, which could not be excused in the present instance, as the House was then sitting, and Mr. Ogle, the sitting member, in London. Besides, no evidence has been produced before the committee, to show, that the remaining charges in the petition are substantial; if they were so, it would have been an easy matter to have given evidence in support of them before the committee here; or, at all events, to show, that they were fit cases for inquiry; and that, without some security on this point, the committee would not allow the parties to be subjected to the additional expense and delay of a commission. It also should be recollected, that yesterday the petitioners stated, they should be ready to proceed with their case this morning; but when the morning arrives, they produce no further evidence, and merely ask for a commission.

Argument for the petitioners.

The substance of the argument for the petitioners was as follows:

There still remains to be enquired into, a claim made by the petitioners to place eight freeholders on the poll; likewise, a charge of bribery against forty freemen; besides the complaint made of the riots which took place, and the improper introduction of the military; together with the specific charge, relative to a place in the excise. It was stated, yesterday, that the petitioners would be prepared to proceed with their case to day; but, on inquiry, it was found, that the evidence here only went to the registration, and not the

possession of the freeholds of those freeholders, and ought to be placed on the poll for Mr. Wallace. This, therefore, is an additional reason why a commission should be granted; for the notice served by the petitioners on the sitting member expressly states, that it is their intention to enquire into *the admissions of the freemen only*, before the committee, and to pray a commission to investigate the other charges contained in the petition. It is, therefore, competent for them, at any time, to ask for a commission. With respect to the notice, that was served in sufficient time, for the committee will take notice, that the petition was presented to the House on Friday, the 22d of January; on Saturday, the House did not sit, and Mr. Ogle was searched for, but could not be found; then Sunday intervened, and on Monday Mr. Ogle is regularly served with the notice. When the statute says, the notice is to be served immediately, it does not mean the moment the petition is presented, but that it should be served without unnecessary delay; in this case, sufficient diligence was used.

Committee require evidence.

The committee being of opinion, that they ought to have some information respecting the number of witnesses to be examined, and the expense and inconvenience that would attend their examination in England, directed their chairman to examine the agent of the petitioners to these facts.

Agent examined.

Mr. Brand then examined the agent for the petitioners, who stated, that the votes of forty freemen were objected to, as having been bribed; to prove which fact, and agency, twenty witnesses were necessary. That twenty-one freeholders were objected to, either as not being properly registered, or as having received bribes, the investigation of which cases would require ten or twelve witnesses; and that a claim also was made to add eleven votes to the poll for Mr. Wallace, to support which, eight or ten witnesses more were requisite.

Resolution. The committee resolved that a commission do issue.

Commission issues. The committee then adjourned, and met on a subsequent day, when the commissioners were named by the parties, and appointed by the committee.

CASE VIII.

BOROUGH OF READING, IN THE COUNTY OF BERKS.

The Committee was appointed on Thursday the 11th of March 1819, and consisted of the following Members:

Joseph Phillimore, Esq. (*Chairman.*)
Peter Brown, Esq.
William Parnell, Esq.
Sir Charles Cockerell, Bart.
William H. Fellowes, Esq.
Hon. Edward Cust,
Lord Strathaven,
William Evans, Esq.
James H. Leigh, Esq.
Henry Clive, Esq.
G. Coussmaker, Esq.
Hon. Frederick Douglas,
Lord Viscount Fitzharris,
John Thomas Fane, Esq. for the Petitioners.
Charles Dundas, Esq. for the Sitting Member.

Nomination.

Petitioners: Electors.
Sitting Member petitioned against: Charles Fyshe Palmer, Esq.
Counsel for the Petitioners: Mr. Harrison, Mr. Wilson, and Mr. Wakefield.
for the Sitting Member: Mr. Warren and Mr. Grey.

Petition. THE petition stated, that at the last election for the borough of *Reading*, Charles Shaw Lefevre, Esq. John Weyland, jun. Esq. and Charles Fyshe Palmer, Esq. were candidates. That at the time of the said election, the said Charles Fyshe Palmer had a pension from the Crown, during pleasure, within the meaning of an act of parliament, passed in the sixth year of her late

Majesty Queen Anne, and was therefore incapable of being elected at the said election, or of sitting or voting as a member of the House of Commons in this present parliament. That the election commenced on Wednesday the 17th of June, and closed on Friday the 19th: and that about half past ten on Thursday morning, one of the petitioners, and two other persons claiming to vote at that election, caused a notice in writing, to the following effect, to be delivered to the returning-officer:

"To Thomas Sowden, Esq. Mayor and Returning-officer, and the Electors of the borough of Reading, in the county of Bucks.

"We, Jacob Newbery, William Grainger, and Joseph Darvall, burgesses of the borough of Reading, in the county of Berks, whose names are undersigned, hereby give public notice, that Charles Fyshe Palmer, Esq. who now offers himself a canditate to represent the said borough in parliament, holds a pension from the crown, within the provisions of the acts of parliament, or one of them hereinafter mentioned; and which pension was granted, and is now paid, and payable to Lady Madelina Sinclair, now the wife of the said Charles Fyshe Palmer, and that the said Charles Fyshe Palmer is disqualified and rendered incapable and ineligible of being elected a burgess, to serve in parliament at the present election, in consequence of such pension, under and by virtue of an act of parliament, made and passed in the sixth year of the reign of her late Majesty, Queen Anne, c. 7, s. 25, by which it is provided, "That no person, having any pension from the Crown during pleasure, shall be capable of being elected, or of sitting or voting as a member of the House of Commons, in any parliament which shall be thereafter summoned and holden;" or, under and by virtue of an act of parliament, made and passed in the first year of the reign of his late Majesty, King George the first, stat. 2, c. 56, s. 9, by which it is

enacted, "That no person, having any pension from the Crown for any term or number of years, either in his own name, or in the name or names of any other person or persons, in trust for him or for his benefit, shall be capable of being elected, or of sitting or voting as a member of the House of Commons." And we do hereby publicly give this public notice, that all votes given for, or in favour of, the said Charles Fyshe Palmer, at this present election, will, on account of the said disqualification and ineligibility of the said Charles Fyshe Palmer, be of no effect, but entirely thrown away.—And therefore, we, the undersigned, do accordingly object and protest against the election and return of the said Charles Fyshe Palmer, as a member to represent the said borough of Reading at the present election.

Signed, J. Newbery, Wm. Granger, and Jos. Darvall. Dated, Reading, 18th June, 1818."

That printed copies of this notice were at the same time stuck up in different parts of the town, and also distributed amongst the inhabitants and electors; and that the notice given to the returning-officer was, at his desire, read aloud at the hustings, in the presence of all the candidates, and great numbers of the electors. That notice was also given to the voters, as they came to poll, that Mr. Palmer was disqualified; and that the votes of those who voted for him after that notice, would be thown away; but that, nevertheless, many persons were admitted to poll for Mr. Palmer. That at the time the notice was given to the returning-officer, Mr. Weyland had a majority over Mr. Palmer on the poll; but that, by the improper admission of votes for Mr. Palmer, after such notice was given, he obtained a colourable majority on the poll, and was declared duly elected; whereas Mr. Weyland had the legal majority of votes, and ought to have been returned.

Facts of the case.

The election began on Wednesday the 17th of June,

and terminated on Friday the 19th. The numbers were, for Mr. Shaw Lefevre, 520; for Mr. Palmer, 379; and for Mr. Weyland, 303. The facts stated in the petition, respecting the notice given of Mr. Palmer's alleged want of qualification, were proved in evidence, namely, that the notice there set out, was delivered to the returning-officer, and publicly read in court, at half-past ten on Thursday morning, at which time Mr. Weyland had a majority over Mr. Palmer on the poll; the numbers then being, for Mr. Shaw Lefevre, 205; Mr. Weyland, 159; and for Mr. Palmer, 147. That Mr. Palmer was present when the notice was read, and requested to be heard; when he denied being disqualified; he, however, stated, that Lady Madelina Palmer had a pension of 200 *l.* a year, but that he had nothing to do with it; and that the protest was a mere election trick. That notice was given to the voters, as they came to poll, that Mr. Palmer was disqualified, and that all votes given for him would be thrown away; and also, that a placard to the same effect was carried through the town, preceded by a band of music. It also was in evidence, that 750 copies of the Protest set out in the petition, were printed, and circulated amongst the voters.

It further appeared in evidence, that a pension of 200 *l.* per annum, bearing date the 17th of September 1801, had been granted to Lady Madelina Sinclair, who in March 1805, married Mr. Palmer. This pension was charged on the Civil List for Scotland, and was paid by the Receiver-general. Mr. Gibson, writer to the signet in Edinburgh, received the pension since 1811, by virtue of a power of attorney, given to him by Lady Madelina and Mr. Palmer, and remitted the amount up to April 1817, to Mr. Palmer, with whom he then kept the account; but, since that period, the pension has been paid to Lady Madelina, in consequence of two letters received by Mr. Gibson, one written by Mr. Palmer,

stating, that Lady Madelina wished to receive it herself; and the other from Lady Madelina, requesting Mr. Gibson to remit the amount to her. It appeared, that subsequently to the date of the petition, the form of the power of attorney had been altered, in consequence of a reference to the Deputy Remembrancer of the Exchequer, who objected to the insertion of Mr. Palmer's name, as irregular; in consequence of which, the power of attorney, at present, is in the name of Lady Madelina only.

Argument for the Petitioners.

The substance of the argument for the petitioners was as follows:—

Although Mr. Palmer, at first sight, might not appear to come within the strict letter of the 6th of Anne (1), yet a review of that and subsequent statutes, enacted for the same object, will show that the present case comes within the operation of that statute. The 6th of Anne disqualifies "any person having any pension from the Crown during pleasure;" not any person to whom any pension shall have been granted, but any person "*having*." The next statute on this subject, is the 1st Geo. I, (2) whereby it is enacted, "That no person having any pension from the Crown for any term or number of years, either in his own name or in the name or names of any other person or persons in trust for him, or for his benefit, shall be capable of being elected, or of sitting or voting as a member of this present or any future House of Commons." The object of both acts is, to secure the purity of the House of Commons, and to prevent any undue influence arising from the Crown, the first act, disqualifies any person having a pension; the second, any person enjoying the benefit of one. The 33d Geo. III, (4) enacts, "That no person shall be eligible to sit in parliament who has any pension from the Crown during pleasure, or for a term of years; nor any person whose wife shall have any pension, during pleasure, or for a term of years." It is true, the act

(1) 6 Anne, c. 7. s. 25.

(2) 1 Geo. I. s. 2. c. 56.

(3) 33 G. III. c. 41.

last cited applies to Ireland and not to England; but the qualifications required in either country being reciprocal, this statute must be considered as embodying the constructions which have been put upon those enacted on the same subject in England. The 6th of Anne, is a remedial statute. Mr. Justice Blackstone, in his Commentaries, says, "Three things should be considered in the construction of all remedial statutes: the old law,—the mischief,—and the remedy;—and that it was the business of the judges so to construe them, as to suppress the mischief and advance the remedy." In this case, the mischief is, the undue influence of the Crown; the remedy, to exclude from parliament those within its influence. Penal statutes, it is admitted, must be construed, strictly; but remedial statutes, liberally; and the statutes, now to be considered, are remedial. Acts of parliament may be construed strictly for one purpose, and liberally for another. An action was brought to recover a sum of money lost at play, under 9 Anne, c. 14. (4); and the Court of Common Pleas held, that act to be a remedial statute; and would not take notice that the parties had dined during the time the money was lost, which, it was contended, took the case out of the act of parliament, as it could not be considered as one sitting; but said, that if an action had been brought by an informer, to recover the penalty, they must have construed it strictly; and held that the money was lost at two sittings. In the present case, it is not contended, that Mr. Palmer has subjected himself to the penalty of 500 *l.*, but merely that he is rendered incapable to sit in parliament, under the remedial clauses of the 6th of Anne. What has been the construction put by committees on the application of other acts of parliament? By the 22 Geo. III, (5) persons employed by the Post-office are rendered incapable of voting for members to serve in parliament. In the case of *Bedfordshire* (6), the vote of Mr. Hempsted was

(4) *Bones* v. *Booth.* 2 Bl. Rep. 1226.

(5) 22 G. III. c. 41.

(6) 2 Lud. 558.

rejected, because he had married the post-mistress at Newmarket, she continuing to hold that situation. In that of *Great Grimsby* (7), the wife of a voter having been proved to have received parish relief within the twelve-month, the vote of the husband was rejected; and in the late case of *Wootton Bassett*, where a voter and his wife were separated, (he living with another woman,) his vote was held bad, because his wife had received assistance from the parish. What are the facts of this case? A pension of 200*l.* per annum was granted to Lady Madelina Sinclair and her assigns; after which she married Mr. Palmer; since which period, that pension has been received under a joint power of attorney given by Lady Madelina and Mr. Palmer, and the money, till very lately, paid to Mr. Palmer himself. Whether this pension was made a matter of settlement does not appear, neither does it signify, because Mr. Palmer must be considered as being benefited by it, either directly or indirectly: it is therefore contended, that Mr. Palmer must be considered as coming within the operation of the statutes relied on, and, consequently, ineligible to sit in parliament. But not only is Mr. Palmer disqualified, Mr. Weyland is entitled to the seat. The election began on Wednesday, and, it appears, that, on Thursday morning, when notice was given to the electors of Mr. Palmer's disqualification, that Mr. Weyland had a majority on the poll above Mr. Palmer; and all votes given for Mr. Palmer subsequent to that notice must be rejected. It is a well-known principle of law, where a candidate, at the time of election, is notoriously disqualified, and notice is given of such disqualification to the electors, that all votes given for that candidate, after such notice, are to be considered as thrown away; and the candidate, with the next majority on the poll, to be entitled to the seat. In the case of *Fife* (8), notice was given to the electors, that General Skene was disqualified in consequence of hold-

(7) 1 Peck. 71.

(8) *Taylor v. Mayor and Aldermen of Bath*; R. v. *Hawkins*, 10 East. 210; *Second Southwark, Clifford, Kirkcudbright.*

ing the situation of baggage-master to the forces, and inspector of the roads in Scotland. General Skene admitted he filled those situations, though he denied he was thereby disqualified; and, on petition, the committee declared the election of General Skene to be void; and seated his opponent. In the case of *Flint*, a committee came to similar resolution, where the candidate returned was under age, of which notice had been given at the poll; and, during the present session, a case in point has arisen, that of *Leominster* (9), in which the committee seated Mr. Harcourt, with a minority on the poll; having decided, that Sir W. C. Fairlie was ineligible, not having the necessary qualification required by the statute of Anne, of which fact notice had been given to the electors. In the present case, Mr. Palmer was ineligible, of which the electors had notice; and, consequently, the candidate next on the poll is entitled to the return.

(9) *Leominster*, ante p. 1, et vide note, and cases there cited.

For the sitting member, it was argued, as follows: The petition, in this case, is founded on the 6th of Anne, but it has not been shown that Mr. Palmer comes within the operation of that act; on the contrary, recourse has been had to enactments contained in other statutes, and to reasoning from analogy, to show, that because some other clause is contained in another statute upon the same subject, that, consequently, the committee must intend that a similar clause is virtually included in the statute of Anne. That statute enacts, "That no person who, shall have in his own name, or in the name or names of any person in trust for him, or for his benefit, any new office or place of profit, &c., nor any person who shall be a commissioner, &c., nor any person having any pension from the Crown during pleasure, shall be capable of being elected, &c."— The words, therefore, "in trust for him," "or for his benefit," do not apply to the latter part of the clause, but merely to the first. They could not apply to the

Argument for the sitting member.

enactment contained in the middle; and have not been revived in the subsequent part of the clause. It, however, has been contended, that the 1 Geo. I. has used the same terms as applied to pensions granted for any term of years. And, further, that a subseqent statute has expressly disqualified those persons whose wives may have pensions, during pleasure, equally with those persons to whom similar pensions have been granted themselves; and that these subsequent enactments are to be considered as constructions put by the legislature on this statute of the 6th of Anne. It has also been argued, that acts of parliament are to be construed liberally; that is not the case; acts of parliament are to be construed according to their meaning, and the language therein contained, and nothing can be supplied which is not to be found in the act itself. It has been said, that the present proceeding is not penal, but remedial only; and it is admitted, that Mr. Palmer has not subjected himself to the penalty of 500 *l.*, because his case does not come within the strict letter of the act. Will the committee then decide, that the statute of Anne applies to a case, in which it is conceded, that Mr. Palmer must have a verdict, if an action were brought for the penalty in the Court of King's Bench? The case of *Bones* v. *Booth* (1), has been alluded to in support of this doctrine, but the distinction stated to have been taken in that case, was not the judgment of the court, but an opinion thrown out by one or two of the judges in the course of their judgments*. But supposing the words, "in trust for him or for his benefit," to apply, that does not help the case. A pension during pleasure, is not given in trust, there is no vested interest given in it. If a pension during pleasure, be given to A. B. and she afterwards

(1) Ante. p. 119.

* The statute is remedial where the action is brought by the party injured, but penal, where brought by a common informer; per Nares, J. 2 Bl. Reports. 1227.

marries C. D., and if C. D. asked for payment, the grantor is at perfect liberty to say, "you have nothing to do with it, I gave 50*l.* a year to A. B. as long as I thought proper; but it does not follow, that I shall continue to give it either to A. B. or to you." Then it cannot be contended, that the clause hunted out of an Irish act of parliament, disqualifying the husbands of those ladies, who hold pensions during pleasure, can have any reference to the present case. The case of Mr. Hempsted, reported in 2 Luder, has been cited as in point. The 22 Geo. III, renders not only postmasters, but their deputies, incapable of voting at elections; and Mr. Hempsted having married a person who was the post-mistress of Newmarket, and who still continued to hold the situation, his vote was rejected, as coming under the latter description. The cases of persons whose votes have been rejected, because their wives had received such relief, have also been brought under the consideration of the committee, as applicable to the present case; it is, however, contended, that the principle on which those cases were decided, does not apply to that at present under consideration. It is not sufficient to show from analogy, that a case comes within the operation of an act of parliament. Unless the petitioners could show, that the statute of Anne, does apply to a person in Mr. Palmer's situation, they do nothing; they have failed to do so, and their case, consequently, must fall to the ground. But, supposing Mr. Palmer is disqualified, the petitioners have not proved enough to give the seat to Mr. Weyland; for, although at the time notice was given of the alleged disqualification of Mr. Palmer, Mr. Weyland might have had a majority on the poll; still, when the poll finally closed, Mr. Palmer had the majority; and to give Mr. Weyland a majority, votes must be struck off the poll for Mr. Palmer, to do which, the evidence which has been given of general notice is not sufficient, and no evidence

has been adduced of any particular notice, as applicable to any individual votes. The case of 2 *Southwark*, is not in point; for there Mr. Tierney had the resolution of a committee, as the foundation of the notice he gave of his opponent's disqualification. This is the first time an attempt has been made to put this construction on the statute of Anne; and it would be advisable, to prevent similar petitions being presented in future, that the committee should decide the present petition to be frivolous and vexatious.

Resolution. The committee resolved, "that Mr. Palmer was duly elected, and that the petition was not frivolous or vexatious."

CASE IX.

THE BOROUGH OF FOWEY, IN THE COUNTY OF CORNWALL.

The Committee was appointed on the 9th of February, and consisted of the following Members:

Lord Althorp, (*Chairman.*)
Abraham Welday, Robarts, Esq.
Sir Matt. White Ridley, Bart.
Robert Bransby Cooper, Esq.
Harrington Hudson, Esq.
Sir William Guise, Bart.
James Dunlop, Esq.
Thomas Wentworth, Beaumont, Esq.
Samuel Horrocks, Esq.
William Lewis Hughes, Esq.
Lord James Townshend.
Hon. Fredrick Douglas.
Hon. Sir Alexander Hope.
Henry Wrottesley, Esq. for the Sitting Members.
Right Hon. Thomas Wallace, for the Petitioners.
} Nominees.

Petitioners: 1. Alexander Glynn Campbell, Esq.
2. Persons claiming to be Electors.

Sitting Members: George Lucy, Esq. Hon. James Hamilton Stanhope.

Counsel for Petitioners: Mr. Warren, Mr. Gaselee; in their absence, Mr. Adam, Mr. G. R. Cross.

Counsel for Sitting Members: Mr. Serjeant Pell, Mr. Harrison; in the absence of either, Mr. Serjeant Blosset.

Counsel for the Returning-Officer: Mr. W. L. Lowndes.

Petition of Mr. Campbell.

MR. CAMPBELL, in his petition, complained,—

1st. That the returning-officer illegally refused to permit many persons who had been *bonâ fide* inhabitants, occupying rateable property within the borough, more than six months before the election, but who had not been rated to the relief of the poor of the borough, in or by any rate made previously to the 30th of March, 1818,

to vote at such election, although such inhabitants were entitled to vote, and did tender to vote for the petitioner and Lord Viscount Valletort (1), upon the ground that those persons had not been rated to the relief of the poor for six calendar months previous to such election, although those persons had been solely prevented from being so rated, by the wilful and illegal neglect and refusal of the overseers and churchwardens to make a rate for the relief of the poor of the said borough and parish.

(1) L^d Valletort died after the election.

2. That the returning-officer permitted many persons, not being then inhabitants occupying rateable property within the borough, to vote for the sitting members.

3. That he rejected the votes of many other persons, legally entitled to vote at such election, who tendered their votes for the petitioner and Lord Viscount Valletort.

4. That he admitted the votes of many other persons for the sitting members, who were not legally entitled to vote at such election.

5 and 6. That the sitting members had been guilty of bribery and treating.

The petition of the electors was to the same effect as that of Mr. Campbell.

Right of election.

By a resolution of the House, 5th May, 1701, it was determined that the right of election for this borough "is in the Prince's tenants, capable of being port-reeves of the said borough; and in such of the inhabitants of the said borough only as pay scot and lot" (2).

(2) 13 Journ. 513. 2 Peck. 515.

By another resolution, 5th March, 1770, it was determined, "that the Prince's tenants capable of being port-reeves, are such tenants only as have been duly admitted upon the court-rolls of the manor, and have done their fealty" (3).

(3) 46 Journ. 274. 4 Mar. 1792. 2 Peck. ib.

And by a third resolution, 21st March, 1792 (4), it was determined, "that the persons entitled to elect the port-reeves of the borough of Fowey, are those who are capable of holding that office; that is, such Prince's tenants only as have been *duly admitted* on the court-rolls of the manor of the said borough, whose lands being freehold, were anciently, and *continue* to be, held *immediately* of the Duke of Cornwall, as parcel of his said manor of the said borough; and whose titles to those lands have been *presented* at a court-baron, by a sworn homage or jury of freeholders of the said manor."

(4) 47 Journ. 574; and in 1 Peck. 525, in which the word "freeholders," in the latter part of the resolution is omitted.

The election took place on the 22d and 23d June 1818; and the candidates were, Mr. Lucy, Colonel Stanhope, Mr. Campbell, and Lord Valletort; and the numbers declared by the returning officer were, for

Mr. Lucy - - - -	78
Colonel Stanhope - -	77
Lord Valletort - - -	44
Mr. Campbell - - -	44

Lord Valletort died shortly after the election.

The petitioners proposed to add to the poll, on behalf of Lord Valletort and Mr. Campbell:—

1. The names of seventy-nine persons, who claimed to vote at the election, as inhabitants paying scot and lot.

2. Forty-three persons who claimed to vote as Prince's tenants, capable of being port-reeves of the borough.

They also proposed to strike off from the poll of the sitting members,

I. The names of forty voters, who had been admitted to vote as Princes tenants, on the following grounds:—

1. Because, at the time of election, the lands, in respect of which they voted, were not held *immediately* of the lord of the manor of the borough.

2. Because the said lands had not *continued* to be held immediately of the lord.

3. Because the titles of the several voters to the said lands had not been *duly presented.*

4. Because the voters were not *duly admitted* on the court rolls of the manor.

5. Because the said estates were *fraudulent and occasional,* and created for the purpose of giving votes at the election.

6. Because the voters *had not done their fealty.*

II. The names of two persons, whose titles to the lands, in respect of which they voted, had not been duly presented; and who had not been duly admitted on the court rolls.

III. One person, whose vote was objected to, because he was not, at the time of the election, an inhabitant, paying scot and lot.

The sitting members, on the other hand, gave notice, under the 53 Geo. III, c. 71;—1st. that they intended to add to their poll the names of forty-five persons, whose votes had been tendered for them at the election, as scot and lot voters, but were rejected by the returning-officer.

2d. That they intended to object, first, to forty-two of the forty-four votes admitted on the poll for Mr. Campbell and Lord Valletort, as not having been inhabitants of the borough, paying scot and lot at the time of the election. Secondly, to two votes, on the ground, that they had not their titles to the lands by them holden, presented at a Court Baron of the borough and manor of Fowey, by a sworn homage or jury of the said borough or manor.

Scot and lot voters.

The counsel for the petitioners proceeded first to the case of the seventy-nine persons who claimed to vote, as inhabitants paying scot and lot.

The circumstances relating to this division of the case appeared to be as follows:— State of the case.

According to ancient and constant usage, the rates for the relief of the poor in the borough and parish of Fowey were made and collected quarterly; but this usage had, in the present case, been departed from, and no rate had been made from the month of March 1817 to the 30th March 1818, when one was made, in consequence of a *mandamus* from the Court of King's Bench. The election took place on the 22d June 1818, being scarcely three months after the date of the last rate; so that the returning officer,—there having been no rate made six months previously to the election, looked to the rate of March 1817, to see whether the persons, whose votes were tendered, were included in that rate, referring, however, to the rate of March 1818 as a guide, to shew whether the persons so rated, continued to be rateable inhabitants at that time; and he rejected the votes of all those persons whose names did not appear upon both rates. The rate of March 1818 was appealed from, and quashed, by judgment of the Court of Quarter Sessions for the county of Cornwall, in July 1818, after the election had taken place, when a new rate was made, dated the 30th of July 1818, in which were included the names of the seventy-nine persons whose votes were now sought to be added to the poll. This rate was appealed against, but was confirmed at the ensuing quarter sessions for the county.

The object of the petitioners was, to shew, that these seventy-nine persons were possessed of rateable property within the borough and parish, six months previous to the day of election; but, in order to entitle them to go into evidence, to prove their rateability, it was admitted to be necessary, in the first instance, to shew that it was owing to the misconduct of the parish officers that they had not been rated; and that they had Course of proceeding.

used due diligence to procure themselves to be placed on the rate (5).

(5) 1 Peck. 479, note (a).

Evidence to shew misconduct in the parish officers, and due diligence on the part of the petitioners.

In order to do this, they produced evidence which proved that it had always been the custom in the borough, to make the rates quarterly. That in the month of November 1817, and previously to that time, various applications were made to the parish officers, to make a new rate, and that vestries were held, and notices given, with a view to the same object. That on the 12th November 1817, another application was made by two persons, of the names of Salt and Leane, to the then churchwardens and overseers, requiring them to make a new rate; on their refusal to accede to which, a rule to shew cause, why a *mandamus* should not issue to compel the parish officers to make a new rate, was moved for and granted by the Court of King's Bench, on the 18th of November. That the time for shewing cause against the rule so granted, would have expired on the last day of Michaelmas Term, 30th November; but that, on the 27th November, an application was made to the Court, on the part of the parish officers, to enlarge the rule till the first day of Hilary Term, 1818, on the ground, that there was not sufficient time to procure, from Fowey, the necessary affidavits, to oppose the granting of the *mandamus*, previously to the expiration of the rule. That the rule was accordingly enlarged to the first day of Hilary Term, in consequence of which, the case was, according to the usual course of practice in that court, set down in what is termed the peremptory paper, and did not come on for hearing till the 7th February 1818; when, after reading the affidavits which were filed on both sides, the rule for a *mandamus* was made absolute. That a *mandamus*, returnable the first day of Easter Term, was accordingly issued, directed to the churchwardens and overseers of the borough and parish of Fowey, commanding them to make and publish a rate for the relief of the poor of the said borough or parish; which

writ was duly served on the 24th of February following. That the 79 persons now sought to be placed on the poll, had, on the 14th of January 1818, given notice of their wish to be placed on the rate, but that the parish officers delayed making a rate, in compliance with the *mandamus*, till the 30th of March 1818, being the day before they went out of office; on which day they made a rate, which was published on the 5th of April following. That the rate, so made, included only 58 of the 79 persons, who had given notice of their claim to be put upon the rate; in consequence of which, an appeal was lodged against it at the ensuing quarter sessions for the county of Cornwall, by persons in the interest of the petitioner; upon the hearing of which, the rate was quashed. That in consequence of the decision of the Court of Quarter Sessions, against the rate of March 1818, it became necessary to make another rate; and that, accordingly, a rate was made and published on the 30th of July, in which were included the names of all the 79 persons, now sought to be placed on the poll. That this rate was appealed against, by persons who had voted for the sitting members, but was confirmed.

Evidence for sitting members.

The counsel for the sitting members, by their cross-examination of the various witnesses, produced on the part of the petitioners, endeavoured to shew, that the parish officers had been guilty of no misconduct, in not making a rate previous to the 30th of March 1818, and succeeded in establishing the following facts: viz. That in consequence of some irregularity in the election of the mayor, the corporation of Fowey had forfeited their charter, and that judgment of ouster had been pronounced against them in June 1817, which rendered it necessary to apply, by petition, to the King in council, for a new charter, which was accordingly done; but that no new charter had yet been granted, so that there were no borough magistrates to confirm a new rate if made, or

to decide upon any appeal against it. That the rates for the year, ending in March 1817, if paid up, would have been sufficient to maintain all the poor of the parish and borough for the ensuing year; but that a Mr. Austen, a gentlemen of large property in the parish, and one of the principal contributors to the poor's rates, who had voted for the petitioner and Lord Valletort, had, upon repeated applications, refused to pay the amount of his assessment, and upon a distress being levied upon his effects, for the purpose of raising it, in November 1816, had replevied, but had not taken the necessary steps to bring his case on to trial. That many other inhabitants of the parish, in the interest of the petitioners, had refused to pay their rates, alleging, as their reason for such refusal, that Mr. Austen had not paid his; and that, at several of the vestries, which had been held at the instance of Mr. Austen, for the purpose of considering the propriety of compelling the churchwardens and overseers to make a new rate, the majority of the inhabitants present, had refused to take any steps to procure a new rate, till the arrears due upon the old rates had been paid up.

Evidence. for petitioner.

To rebut this evidence, the counsel for the petitioner entered into further evidence to prove, that Mr. Austen and the other persons who were stated to have refused the payment of their rates, had repeatedly offered to pay them, provided the parish officers would permit them to inspect the rates, but which they were not suffered to do. That the rates were considered by many persons in the parish, to have been unequal; and that at many vestries, held for that purpose, resolutions had been agreed upon, whereby it was resolved to be expedient, that a new rate should be made, and that the parish and borough should be surveyed and valued, in order that the rate might be made equal; and, particularly, that a vestry, was held for that purpose on the 27th November 1816 at which resolutions to the above effect were come to, in

pursuance of which, two surveyors were appointed to survey the parish and borough, and had actually commenced so to do, but were prevented by the interference of the town-clerk, who was also the solicitor for the parish officers. That at other vestries held in August and September 1817, it was resolved, that the resolutions of the former vestry should be carried into effect; that frequent applications were made to the parish officers, collectively and individually, to produce their accounts, but which, although promised, was never done:—That at one of the vestry meetings, some inhabitants of the parish, (in consequence of the parish officers having given it as a reason for not making a new rate, that unless the arrears due from Mr. Austen and his friends were paid, a new rate could not be collected,) had offered, if the parish officers would consent to make a new rate, to assist them in the collection of it, or even to deposit the amount of the arrears due from Mr. Austen and the other persons, but which was declined; and that money was advanced to the overseers, from a particular individual, in the interest of the sitting members, to enable them to maintain the poor of the parish without having recourse to a new rate.

Poor's rate made after an election tendered in evidence.

In the course of the evidence above stated, the petitioners counsel having produced the proceedings in the Court of King's Bench, previous to the granting of the *mandamus*, together with the *mandamus*, and the return to it, and the rate of the 30th March 1818, offered to produce the rate of July 1818, which was made subsequently to the election, which was objected to by the counsel for the sitting members; who contended, that this rate being made subsequently to the election, could not be received as evidence of any thing which existed before it took place; that the only evidence which could be received, with reference to this subject-matter, were things which took place before the election; because, if those things which were done

Argument against its reception.

afterwards, could be admitted, things might be admitted which might have been done with an intention of forwarding the views of the party producing it.—That the object of the petitioners in producing this rate was, to shew, that certain persons were possessed of rateable property previous to the election; but, that it was probable, their names might have been added, to forward the views of the petitioners:—that its reception would lead to great inconvenience, as it would be very easy for persons, after an election, to put names into a rate, and by that means, throw it upon the other party to prove that they were not liable to be rated; and that by such means, a strong *primâ facie* case might be made, by means of an unfair rate, which the other party might have great difficulty in negativing.—That the only rate which could be given in evidence in this case, was the rate of the 30th of March 1818, which had been quashed; and that if the rate of July 1818 was admitted, any other subsequent rate would be admissible on the same principle, and no boundary could be drawn.

Answer. To this it was answered, that the object in producing the rate of July 1818, was to shew, from the circumstance of the seventy-nine persons being upon that rate, that they had taken steps to be placed upon it.—That the rate of the 30th March 1818, having been quashed, could not be referred to for that purpose, and that the rate of July was the substitute for it.—That if the rate of July had been quashed, and another made in October, the rate of October would have been the one to refer to, and so on, as long as one rate continued to be the substitute for another; but that the first valid rate would be the boundary.

Decision. The committee decided, "That the rate should be admitted."

Church rate offered in evidence. The counsel for the petitioners, also offered to produce a church rate, in which the names of many of the per-

sons sought to be placed on the poll were included; but its reception was objected to, on the part of the sitting members, on the ground that the poors rate was the only rate that could be admitted in evidence, to shew, that a voter was an inhabitant paying scot and lot. That there was no instances since the 43d Eliz. in which a church rate had been considered as the guide. That the reason of the distinction between the poor rate and the church rate was, that a person might appeal against the poor's rate, whether his name were upon it or not, but that it was not so with respect to the church rate; and that no person could compel the parish officers to put him on the church rate as he might do on the poor's rate. To this it was answered, by the petitioner's counsel, that although the poor's rate was generally taken to be the rule for discovering who are to be the persons paying scot and lot, yet, that as scot and lot existed long before the 43d of Eliz., by which the poor's rate was created, the poor's rate could not be the only criterion (6); and that, at all events, in the absence of the poor's rate, a church rate was admissible as circumstantial evidence, to show, that the persons whose names were upon it, were payers of scot and lot. That in this case the poor's rate of March, 1818, having been quashed, it must be taken that there was no such rate, and that, consequently, the church rate, for the same period, was admissible. The committee determined, that the rate was admissible; but, upon its production, it appeared, that instead of bearing date the 30th March, 1818, as was supposed, it was dated in March, 1817; in consequence of which, the committee refused to receive it, on the ground that, as there was a poor's rate of the same date which had not been appealed from, a church rate for the same period was not admissible *.

Objected to.

Argument for its reception.

(6) 1 Doug. 127. 140. 2 Doug. 75. 126. 82. 3 Lud. 125. Vide also, 1 Peck 103.

Decision.

* This objection was taken by one of the members of the committee. The result of these decisions appears to be, that where

Question raised, as to due diligence.

The above evidence having been gone through, the counsel for the petitioners proposed to call witnesses to prove the rateability of the seventy-nine persons whose votes were tendered for Mr. Campbell and Lord Valletort; upon which, a long argument took place upon the question, whether the petitioners had succeeded in establishing a sufficient case to entitle them to go into evidence of rateability. The substance of the arguments, on both sides, was as follows:—

Argument for the sitting members:

Argument for the sitting members.

By the statute 26 Geo. III, c. 100, no person can be admitted to vote at any election, as an inhabitant paying scot and lot, &c. of any city or borough, unless he shall have been actually and *bonâ fide* an inhabitant, paying scot and lot, &c. within such city or borough, six calendar months previous to the day of the election at which he shall tender his vote." The question, therefore, is;—in a borough of this description, what is proper and legitimate proof of the fact of a person being such inhabitant, paying scot and lot?

The usual mode of ascertaining this, is, by reference to the existing poor's rate, which, whatever may have been the rule, previously to the 43d Eliz. is now settled to be the proper guide. But the petitioners, in this case say, that as there was no existing rate which could be referred to, of a later date than fifteen months previously to the election, they ought to be permitted to prove, by other evidence, that the persons they now seek to place upon the poll were possessed of rateable property, the requisite time before the election; they admit, however, that to entitle them to enter into that proof, they must show, that these persons used due diligence to procure themselves to be put on the rate. The

there is no existing poor's rate, a church rate is admissible as evidence, to show the rateability of the persons named in it; but that if there happens to be a poor's rate for the same period, a church rate cannot be received.

question, therefore, now is,—can they, (under the circumstances proved,) be said to have used due diligence.

In order to show that they have used due diligence, they must, in the first place, prove misconduct on the part of the parish officers (7), and then they must shew, that they have taken the necessary legal steps. Now, what is the result of the evidence here, as to the misconduct of the parish officers? It is said, that the overseers were applied to by individuals, to make a new rate, and that they refused; but it appears that some of these individuals, who made this application, had not paid up their old rates. The answer of the overseers, therefore, was, why do not you pay your arrears? How can we go to a poor man, and ask him to pay a new rate, when Mr. Austen, the richest man in the parish, has not paid his share of the old rate? It is said, that Mr. Austen did offer to pay his old rate; but, if he did, his offer was coupled with a condition which was illegal, so that his offer amounted to nothing. But supposing the officers had made a rate, the corporation were dissolved, and there were no justices in the borough to confirm it, nor to decide upon any appeal which might be made against it. It is proved, that if Mr. Austen had paid his rates, there would have been no immediate necessity to make a new rate; and even without that, the officers had means of supporting the poor, and were, therefore, justified in waiting till Mr. Austen should pay, and the affair of the charter be adjusted.

(7) St. *Ives.* *Peterborough,* 3 Doug. *Seaford.* Ibid, 45.

So far from proving misconduct in the parish officers, the evidence amounts to proof of gross misconduct on the other side. It has been proved, that Mr. Austen, who was a rich man, refused to pay his rates, thereby setting a bad example to every body else, and that many others were not backward in following such an example.

It is said, that the rate of March 1817 was an unfair rate; but it was unappealed from, and must, therefore, be taken, as if it had been a fair one; at all events, they

might have applied to have it amended under the 41 Geo. III, c. 29, by the insertion of the omitted names. But instead of doing this, they chose to apply to the Court of King's Bench for a *mandamus*, which was not their proper remedy. But, even in their application for a *mandamus*, they have been guilty of unncessary delay. The last rate expired in March 1817, and we concede to them for the present, that they had no time to make any application to the Court of King's Bench before the expiration of Trinity Term, yet still there was an unnecessary delay. No step was taken till the 8th of November, when a demand for the rate was first made, with a view to the *mandamus*; the consequence was, that no application could be made to the Court till the 18th of November. If they had made their demand sooner, they might have applied on the first day of Michaelmas Term the 6th of November. So that twelve days were lost, which were very material; for, if they had applied for a rule on the first day of Term, cause must have been shewn during that Term, and the *mandamus* would have issued, and the rate might have been made at Christmas, which would have been six months before the election; but owing to the delay in making the application for the rule, cause could not be shewn before Hilary Term 1818. Fowey is 250 miles from London; the rule, therefore, could not be served till 22d November, and Term ended on the 28th, so that it was impossible to procure the affidavits in answer, and take the other necessary steps, before the end of Term. It was absolutely requisite, therefore, to have the rule enlarged till Hilary Term 1818. The consequence was, that it got into the peremptory paper, when neither party could hasten it, but were obliged to leave it to come on in its turn, which did not take place till the 6th of February, when the *mandamus* issued. The writ was served on the 24th February, but no rate was made in pursuance of it till the 30th of March, being the day

before the overseers went out of office, which is another instance of culpable neglect. It is said, that applications were made by these persons to be put on the rate; but when was this application made? Was it six months before the election? No; it was not till the 14th of January, which is also an instance of culpable neglect. But it appears that 58 of these persons were put upon the rate of the 30th March; they were not, however, content with that, and as soon as they were put on, they took steps to get rid of the rate. In considering this case, we must look to their proceedings, either as individuals or as a body. If we are to look to them as individuals, we say they have not used due diligence to be put on the rate, because it does not appear that they have individually taken any legal steps; and, if we are to consider them as a body, we can only look to the acts of the majority, and then we find, that of the 79, the majority were put upon a rate, and which rate they themselves subsequently overturned.

We have nothing to do with the rate of July 1818; if that rate was to prevail in the borough, it could only prevail from July, and not before.

Argument for the petitioners:—

Argument, for the petitioners.

The fact, that the overseers had so far neglected their duty, as to omit making a rate for a whole year, is sufficient proof of misconduct on their part. They were bound to make a rate at the commencement of every quarter, for the relief of the poor in that quarter, which they omitted to do. It is said, however, that there was no necessity to make a rate, as they had sufficient funds for the maintenance of the poor without it; but it appears that these funds were borrowed, and they had no right to borrow money for the purpose of maintaining the poor; they could not make a retrospective rate, for the purpose of repaying what they had borrowed. Overseers cannot raise upon those who are inhabiting a place to day, the expences of the preceding year,

(8) 5 T. R. 159. *King* v. *Goodcheap* (8); such a proceeding might be very injurious, as five hundred might have gone out of a parish within the year, which would bear very hard upon those who remained.

It has been attempted to impute misconduct to us, on the ground of Mr. Austen's refusal to pay the rate in March 1817; but we have shewn, that Mr. Austen was ready to have paid, if he had been allowed to see the rate. Every man in a parish has a right to see the rate, and to have a copy of it; but this was refused. Other persons made the same offer; some even offered to deposit the amount of Mr. Austen's arrears, and these offers were declined; and yet we are told, that the overseers were justified in not making a rate, because Mr. Austen had not paid his arrears. Were there no remedies to compel him to pay? The parish-officers, it is said, distrained; but Mr. Austen replevied. Why did not the parish officers get the cause tried at the next assizes? It does not even appear that they procured an assignment of the replevin bond. We have shewn, that many applications were made to the parish officers to make a rate, but that they refused, and that the reasons they gave for such refusal, were false. That is sufficient to establish the fact of misconduct on the part of the parish officers, and brings us to the question of due diligence.

The whole delay imputed to us is twelve days; and, it is said, that by delaying our application for the *mandamus*, we lost the whole of Michaelmas Term, and that, if we had obtained the *mandamus* in Michaelmas Term, we might have had a rate by Christmas. It is not quite clearly made out, that, if we had applied twelve days earlier, we should have got the *mandamus*; and, if we had, the probability is, that the officers would have acted in the same way as they did in March, and would have delayed making their return till the last moment. The *mandamus* was served upon them in

February, and they made no rate till the day before they went out of office; viz. the 30th of March. That shews they were inclined to do nothing till compelled. But the *mandamus* was delayed by the parish officers themselves; if they had not enlarged the rule, the *mandamus* might have been issued in Michaelmas Term.

Fault is found with us, for resorting to a *mandamus* at all. They say, that if we were dissatisfied, because our names were not on the rate of March 1817, we should have applied, under the 41st Geo. III, c. 23, to have had our names placed upon the rate. But that statute only gives justices the power of inserting names in court, upon appeal; and, even then, they may either grant the rate or amend it; so that, in order to do that, supposing these persons to have been inhabitants at that time, they must have appealed to the magistrates of the corporation: but, surely, they cannot be much blamed, for not appealing in April to a tribunal, which it was found necessary to dissolve in June. The state of the borough at that time was an excuse for not appealing against a rate; but it was no excuse for not making a rate. Independently of this, if these persons were not inhabitants before March 1817, they could not have appealed against that rate; and could only relieve themselves, by calling upon the officers to make a new rate. That these persons were improperly excluded is evident, from the circumstance that fifty-nine of them were put upon the rate of March 1818. But, it is asked, why we procured that rate to be quashed? The answer to that is, because, although the parish officers had dealt some justice, they had been too sparing of it. The whole of the seventy-nine names were inserted in the rate of July, which shews that they were improperly excluded before.

Reply,

Reply.

It has been said, that the parish officers were guilty of misconduct in not bringing forward the question of

Mr. Austen's replevy sooner than they did. The answer to that is, "Why did Mr. Austen replevy at all? What legal grounds had he? If he had any real objection to the rate, he should have appealed against it, and not by refusing to pay it after it was confirmed, have thrown the parish officers into difficulties. As to the answers given by the officers to the applications which were made to them to make a new rate, they were perfectly true and correct. How could it be expected that the overseers would be able to collect a new rate from the poorer persons in the place, when such a man as Mr. Austen had refused to pay what was already due from him on the old ones? and, besides, if the state of the borough was a good reason for not appealing against the old rate, it was an equally good reason for not making a new one. The officers could not make a rate, because they did not know whether or no there were any justices who could approve of it, when made. With respect to the time of the application for the *mandamus*, it only was admitted for the sake of the argument, that they had no time to apply to the court before Michaelmas Term; but the fact is, there was nothing to prevent them from applying in Trinity Term, so that at all events their application ought to have been made on the first day of Michaelmas Term.

Decision of the Committee.

The committee determined, that the counsel for the petitioners should be at liberty to enter into evidence, to prove the rateability of the seventy-nine persons proposed by them to be placed on the poll.

Proposal, that the case of each vote should be gone into separately.

In consequence of this decision, the petitioners counsel called several witnesses to establish the rateability of the first person whose vote they proposed to add to the poll, and having gone through the whole of their evidence, as far as related to that vote, they proposed, that the counsel for the sitting members should be called on to proceed with their proof, to negative the right of that voter to be put on the poll; and that the committee

should determine the right of each person, vote by vote; and in support of their proposal, they cited the *Middlesex case* (9).

(9) 2 Peck. 1.

This was objected to, by the counsel for the sitting members, who suggested, that the evidence as to the whole number of persons whose reateability was proposed to be proved by the petitioners, should be gone through, before they were called upon to rebut any part of it; and mentioned, that such had been the course adopted in the last petition for *Wootton Bassett*. 1816.

Objected to.

The committee determined, that the course proposed by the counsel for the petitioner, should be pursued.

Adopted by the Committee.

The cases of the seventy-nine voters, whose names were sought to be added to the poll, on behalf of the petitioners, were then gone through separately, the committee decidingupon each case as it arose, after hearing the evidence adduced by each party relating to it.

In the course of the scrutiny, the committee rejected the votes of all those persons whose names were upon the rate of March 1818, and who had refused to pay that rate upon demand, although the rate was afterwards quashed. The discussion which led to this determination, took place upon the tender of the vote of George Jewell, who was on the rate of March 1818 (1); and was proved by the petitioners, to have been in the possession of rateable property six months before *the day of election* (2). It appeared, however, upon the examination of one of the overseers, that upon being called upon before the election, to pay the rate of March 1818, which was afterwards quashed, he had refused to pay it.

G. Jewell's vote.

(1) 1 Peck. 108. *Bridgewater.*

(2) 2 Peck. 161. & 165. n. Ibid. 396.

The following is the substance of the argument, on the part of the sitting members:

Objected to by the sitting members. Argument.

It is clear that it is equally necessary to complete the qualification of a scot and lot voter, that his assesment should be paid, as that his name would appear upon the rate; and that where there is a rate, no excuse, but that of fraud in the parish officers,

is admissible for the non-payment of it. It is likewise clear, that by the statute 41 Geo. III, c. 23, s. 8 (3), the payment of a quashed rate might legally be enforced; and that it makes no difference upon what grounds the rate be quashed, or whether it be quashed or amended, so that it was evident that since the passing of that act, even the badness of the rate was no excuse for the non-payment of it; much less could it be in the present case, as at the time the payment of their rate was refused, it was to all intents and purposes a good rate; no appeal having been lodged against it; the notice of appeal bearing date the 27th of June, which was after the election.

(3) 1 G. III. c. 23.

Argument for the petitioners.

For the petitioners it was contended, that the circumstance of the rate of March 1818 having been quashed, shewed, that the voter was justified in refusing to pay it:—That the refusal being before appeal, made no difference, since it was notorious the rate would be appealed against, and that at all events, by paying the rate of July, the voter placed himself in the same situation as he would have been in, had he paid the March rate, the July rate being in fact, a substitution for that rate:—That the law before the statute 41 Geo. III, c. 23, was in their favour; as the rate would then have been a nullity *ab initio* (4), and being a nullity, any payment towards it would have been a nullity also; and the parish officers would have been liable to an action, had they proceeded to enforce the payment of a rate, which was afterwards quashed; so that at common law, the question on that vote would have been, not whether the voter had paid the rate of March, because, that having been subsequently quashed, there was, in effect, none to pay, but whether he had rateable property? The statute makes no difference in the law, with respect to election rights, the object of it being merely to provide, that notwithstanding an appeal, there should be money in the hands of the overseers to relieve the poor, so that with respect to

(4) *King* v. *Newcombe*, 4 T. R. 368.

elections, the law remained as it was before the statute. That the statute only directed, that payments, made upon a defective rate, should be taken as made for the next effective rate; but that if persons chose to run the risk of refusing to pay their rates, they might, and their refusal would be right or wrong, according to the event. That in this case, the voter had chosen to run that risk; he had refused to pay the rate, and the event proved that his refusal was justifiable. That the rate of March having been quashed, there was, in fact, no rate to pay; and that the question, therefore, was not, whether he had paid his rates, but whether, he had rateable property? which he was proved to have had.

Reply. To this it was replied, on the part of the sitting members, that no case had been cited, on the part of the petitioners, to show, that the law, before the passing of the statute 41 Geo. III, c. 23, was as they had stated it, and that, in fact, it was otherwise, and that no person, before that statute, was justified in refusing the payment of a rate, unless on the ground of fraud or misconduct in the parish officers. That the payment of the March rate would not have been a nullity, although it was afterwards quashed; since it was clear, that, at common law, rights might be acquired under an illegal rate, *King* v. *Inhabitants of Edgbaston* (5): and that the same doctrine had been established in committees, *Milbourne Port* (6). That at all events, the statute did not leave it to the option of a party, whether he would or would not pay an invalid rate, since it gave the overseers the power of enforcing the payment of it. And that the payment of the July rate, even admitting it to have been a substitute for that of March, could have been of no avail, as no payment after an election can entitle a party to vote.

(5) 6 T. R. 540. 19 Vin. Ab. 386.

(6) 1 Doug. 129. 141.

Decision. The committee determined, that the vote of George Jewell should not be placed upon the poll.

Case of G. Jewell re-argued. An application was afterwards made, by the counsel for the petitioners, for liberty to re-argue the case of this

voter, which was objected to by the counsel for the sitting members; but the committee determined, that the question relative to this vote should be re-argued; and accordingly, on a subsequent day, the case was re-argued, by two counsel on each side, when,

Second decision.

The committee resolved, "That the determination, that the vote of George Jewell be not placed upon the poll, should stand confirmed."

Evidence offered to show fraud in the rate of March 1818.

The consequence of this decision, being the exclusion of a great number of the votes offered on the part of the petitioners, their counsel endeavoured to get rid of the effect of it, by shewing that the voters were justified in their refusal, by the fraudulent nature of the rate, and for this purpose, offered to produce evidence of the fraud. This was objected to by the counsel for the sitting members, on the ground, that if the committee were to allow the petitioners to go into that question, they would, in effect, overrule their decision upon Jewell's vote, and that in fact this was nothing more than an attempt to try that part of the case over again. The committee refused to permit the evidence to be gone into.

Rejected.

Votes not included in the rate of March, 1818; or in the notice of appeal from it, but rated in July.

In the course of the scrutiny, a question also arose, as to the admissibility of certain voters, whose names were not included in the rate of March 1818, or in the notice of appeal from it, but who were included in the rate of July 1818. The counsel for the sitting members contended, that these voters, not having their names inserted in the notice of appeal, had not used due diligence, and, therefore, were not entitled to vote. To this it was answered, that although their names were not included in the notice of appeal, the circumstance of their being rated in July, shewed that they had taken steps to be put upon it, and brought them within the principle adopted by the committee, when they received the rate of July in evidence. The committee determined that these votes were admissible.

Admitted.

The committee, upon the same principle, afterwards rejected the vote of a person, whose name did not appear upon the rate of March 1818, or in the notice of appeal from it, and who did not appear to have been rated in the July rate, although he was proved to have been in the occupation of rateable property, six months before the election.

Secus, where not rated in July.

Several other questions arose in the course of the scrutiny, which will be noticed hereafter, amongst the incidental points (7).

(7) Post 166.

The petitioners succeeded in establishing forty-two of the seventy-nine votes tendered by them, to be placed on the poll for Mr. Campbell and Lord Valletort. The numbers upon the poll then stood as follows; viz.

State of the poll.

Mr. Lucy - - - -	78
Colonel Stanhope - - -	77
Lord Valletort - - -	86
Mr. Campbell - - -	86

The petitioners having concluded that part of their case which related to the scot and lot voters, proposed by them to be added to the poll, it was then arranged, that the sitting members should proceed with their case, as far as related to the scot and lot voters, proposed to be added by them to the poll.

Sitting members go into their case, as far as relates to the scot and lot voters proposed to be added to the poll.

They consisted of forty-five persons, whose names were upon the rate of March 1818, but who had been rejected by the returning-officer, upon the same ground as the seventy-nine votes who were tendered on behalf of Mr. Campbell and Lord Valletort; viz. because they were not on the rate of March 1817.

State of the case.

The course pursued by the sitting members in establishing these votes, was nearly the same as that adopted on the part of the petitioners, with respect to the votes proposed to be added by them to the poll on the same grounds. They called evidence, to establish the fact of their being in the possession of rateable property six

Course of proceeding.

months previous to the election; and proved the payment of the rate of March 1818.

Vote of Jos. Soady.

Having proved that Joseph Soady had duly paid the rate, they proceeded to call evidence to show his rateability;

Objected to.

which was objected to on the part of the petitioners, first, because he had not been proved to have used due diligence:—secondly, because the rate of March 1818 was fraudulent; to prove which, they offered to produce evidence, to show the fraudulent nature of that rate.

Argument for sitting members.

The counsel, for the sitting members, however, insisted, that the petitioners could not be permitted now to go into the question of fraud in the rate of March 1818; first, because it was not mentioned in their opening;—secondly, because it had been proved, that the voter in question was possessed of rateable property; so that, whatever fraud there might be in the rate with respect to others, with respect to him, the rate was fair. With regard to the question of due diligence, they contended, that all necessary diligence had been used; that the whole ground of complaint, on the part of the petitioners, was, that the rate ought to have been made at Christmas, instead of March;—but that, if it had been made at Christmas, it would not have been sufficiently early, any more than the rate of March, as it would not have covered six months before the election. That the evidence which had been given, of the diligence used to procure the *mandamus*, must apply, either to individuals, or to the whole parish. That it had all along been treated as applying to the parish, as, otherwise, only those individuals who were actually found to have applied for the *mandamus* would have been entitled to vote; and that, as it had been treated as a parochial affair, the whole parish had a right to the advantage of it.

Argument for petitioners.

To this, it was answered, by the counsel for the pe-

titioners, that, although the question of fraud had been omitted in their opening, they were entitled to go into it, to destroy the case of the sitting members. That it was admitted, on the part of the sitting members, that due diligence was necessary, to entitle these parties to vote; and yet the conduct of these persons had been such, as to throw difficulties in the way of procuring the *mandamus*, and that they ought not, therefore, to be allowed to take advantage of it.

The committee determined, that the counsel for the sitting members should be permitted to prove the rateability of Joseph Soady, unless it could be proved that he was personally active in opposing the making a new rate; but that the counsel for the petitioners should not be allowed to go into the question of fraud, in the composition of the rate of March 1818, in objection to the votes which the sitting members proposed to place upon the poll. Decision.

In consequence of this decision, a great deal of evidence was gone into on the part of the petitioners, to prove, that several of the voters now proposed to be added to the poll had been active in opposing the making a new rate, by voting, or holding up their hands against it, at the vestry-meetings; and, wherever it was clearly established, that the voter had either voted or held up his hand, at the vestry-meetings, summoned for that purpose, against the making a new rate, the committee rejected his vote.

The sitting members succeeded in establishing twelve only of these votes upon their poll; in consequence of which, the state of the poll was,

Mr. Lucy - - - -	90
Colonel Stanhope - - -	89
Lord Valletort - - -	86
Mr. Campbell - - -	86

The petitioners counsel then proceeded to the case of the voter whom they propose to strike off from the Course of proceeding.

Petitioners propose to strike off the poll a voter as not being an inhabitant paying scot and lot.

poll of the sitting members, as not having been an inhabitant, paying scot and lot, six months previous to the election. The ground of their objection was, that he had refused to pay the rate of March 1818; but they failed in their proof of that fact; in consequence of which, the committee determined that his vote should not be struck off the poll.

Sitting members offer to proceed with the case of the voters proposed by them to be struck off the poll of the petitioners.

The counsel for the sitting members, then offered to proceed to the cases of the forty-two votes admitted on the poll for Mr. Campbell and Lord Valletort, as scot and lot voters, which they had given notice of their intention to strike off the poll. An objection was, however, taken to their proceeding with this part of the case, on account of the manner in which they had worded the list of these votes, which had been delivered in pursuant to the 53d Geo. III, c. 71. The list purported to be "a list of forty-two voters, admitted on the poll for Mr. Campbell and Lord Valletort, who were objected to by the sitting members, viz., as to forty of them, as not being inhabitants of Fowey, paying scot and lot;" but, in the margin of the list, was added these words,—"the objection against these voters will only be insisted on, in case the committee resolve, that the rate, of 30th March 1818, should have been acted upon at the election; if that rate is set up, then these voters are objected to, as not having paid that rate." The counsel, for the petitioners, contended, that as the committee had not decided, that the rate of the 30th of March should have been acted upon at the election, the sitting members were precluded, by the terms of their notice, from going into their objections to these votes.

Objected to on account of informality in the list.

Decision.

The committee, however, determined, that the counsel for the sitting members were not precluded from entering into the question of the votes, included in their notice, by the terms in which they had worded that notice.

An attempt was made, on the part of the petitioners, to prove, that although some of the voters had refused payment of the rate of March 1818, they had paid the rates of March 1817 and of July 1818; but the committee decided, that these cases could not be distinguished in this respect, from those under similar circumstances, which they had formerly decided; and that the vote should be struck off the poll.

Petitioners offer to prove payment of rates of March 1817 and July 1818. Evidence rejected.

The counsel for the sitting members, succeeded in striking off twenty of these voters from the poll of Lord Valletort and Mr. Campbell, when the poll remained as follows:

State of the poll.

Mr. Lucy - - - - -	90
Colonel Stanhope - - -	89
Lord Valletort - - - -	66
Mr. Campbell - - - -	66

The sitting members having succeeded in maintaining a majority upon the poll, on the scrutiny of the scot and lot voters, the counsel for the petitioners proceeded with the case, relating to the Prince's tenants.

Case of the Prince's tenants, (7) Ante, p. 126.

It will be seen from the terms of the resolutions before stated (7) "That the right of election in this borough, as far as relates to the burgage-tenants, was determined to be in the Prince of Wales's tenants, capable of being port-reeves of the borough", who by subsequent resolutions, were declared to be "such tenants only, as had been duly admitted upon the court rolls of the manor, and had done their fealty, and whose lands being freehold, were antiently, and continued to be held immediately of the Duke of Cornwall, as parcel of the borough and manor of Fowey, and whose titles to those lands have been presented at a court baron, by a sworn homage, or jury of freeholders of the said manor."

History of the borough and manor.

It appeared, that the borough of Fowey is a borough by prescription, and that the borough and manor, previous to the dissolution of monasteries and other religious houses, in the reign of Henry VIII, belonged to

Borough and manor annexed to the Dutchy of Cornwall. (7) Vide *The Prince's case.* 8 Rep.

the monastery of *Tywardreth*; and had not long before that period, viz. in the year 1540, been annexed to the Dutchy of Cornwall, in exchange for the honor of Wallingford, in the county of Berks, (7), and had continued parcel of the possessions of that dutchy, till the year 1798, when it was sold under act for the redemption of the land-tax, 38 Geo. III, c. 60,

Sold to P. Rashleigh, Esq.

to Philip Rashleigh, esq.; who, by his will, dated the 3d March 1803, devised all his manors, messuages, lands, tenements and hereditaments, and real estate, whatsoever and wheresoever, to the use of his brother, Jonathan Rashleigh, for life; with remainder to William Rashleigh the eldest son of his said brother Jonathan Rashleigh for his life, with remainder to his first and other sons in tail.

Jonathan Rashleigh the brother having died in the lifetime of P. Rashleigh, the testator, the manor and borough of Fowey together with the other lands comprized in his will, became vested on P. Rashleigh's death, in William Rashleigh as tenant for life, who availed himself of the land-tax redemption act, 53 Geo. III, c. 123, to sell and convey the manor and borough of Fowey, to Thomas Hamlet his heirs and assigns. The conveyance to Hamlet was dated 27 December 1817, and by indentures of lease and release, dated the 4th and 5th February 1818, Hamlet conveyed the manor and borough to Mr. Lucy, the sitting member. These conveyances comprized only the seigniory, and the rents services, &c. incidental thereto.

Conveyance of the manor and borough to T. Hamlet,

to Lucy.

Burgage tenements.

Shortly after the conveyance of the manor and borough to Mr. Lucy, Wm. Rashleigh made another conveyance under the 53 Geo. III, c. 123, of several burgage tenements, within the borough and manor, which had belonged to P. Rashleigh, to Mr. Hamlet in fee, who, a few days afterwards, conveyed the same tenements to a person of the name of John Lane, his heirs and assigns for ever. Having become seised of such burgage tene-

Conveyed to Hamlet.

Conveyance to Lane.

ments, by virtue of such conveyance, in fee, Lane, in the same month, executed several conveyances by lease and release of many of them to different persons, "to hold for the term of their natural lives." These conveyances were all presented at a court of the manor, held on the 18th May following, when the persons, to whom they were made, were admitted tenants accordingly. In the commencement of the month of June following, Lane executed several similar conveyances of more burgage tenements to other persons also for life, which were presented, and the persons named therein, admitted tenants at a subsequent court, held on the 18th June.

Conveyance from Lane to the voters.

The persons, to whom these burgage tenements were so conveyed by Lane, amounted to thirty-four, and they all voted for the sitting members, and were included in the list, delivered in by the petitioners, of the persons proposed by them to be struck off the poll of the sitting members, as having been improperly admitted to vote as Prince's tenants, capable of being port-reeves of the borough. They all came within the first ground of objection, mentioned in the list delivered in by the petitioners, namely, "that the lands, in respect of which they voted, were not held immediately of the lord of the manor of the borough."

Objections to votes of Prince's tenants.

An attempt was also made, on the part of the petitioners, to bring some of these voters within the second ground of objection mentioned in their lists, viz. that their lands had not *continued* to be *held* immediately of the lord, but which failed for the reason shortly after stated.

The evidence adduced on the part of the petitioners, in support of their first objection, consisted of the court rolls of the manor, containing the presentations of the conveyances of the burgage tenements from Hamlet to Lane in fee, and of the subsequent conveyances from Lane to the voters for life, and the admissions of such voters as tenants. The courts were described in the rolls, as "Courts of George Lucy, Esq., lord of the

Evidence as to 1st objection.

manor and borough of Fowey, in the county of Cornwall."

Evidence as to 2d objection.

In order to support the second ground of objection to some of these voters, viz. that that their lands had not continued to be held of the lord of the manor; they proved, by means of the court rolls, that many of these tenements were previously to, and at the time of his purchase of the borough and manor, vested in Philip Rashleigh in fee, as tenant to the Duke of Cornwall, with the view of afterwards showing, that, by his purchase of the manor and borough, he had become lord of the manor, and, consequently, could not be *tenant*, so that a discontinuance had taken place in the tenancy as to those tenements. And for this purpose, they produced a certificate, under the hand of the surveyor-general of the Dutchy of Cornwall, of the contract entered into under the 38 Geo. III, c. 60, for the sale to Philip Rashleigh of the borough and manor of Fowey, as evidence of the transfer of the borough and manor to him. But, upon inspecting this instrument, it did not appear that the receipt for the consideration money, which the 59th section of the act requires, should be placed at the foot or on the back of the certificate, was signed by the *cashier* of the Bank of England, according to the directions of the same section of the act: in consequence of which, the counsel for the sitting members objected to the admissibility of the certificate. And the committee determined, that it could not be received.

Certificate of contract, under land tax redemption act, offered in evidence.

Objected to.

Decision.

Objection to the petitioners proceeding with the question of the *immediacy* of the tenure.

In consequence of this decision, the counsel for the petitioners abandoned that ground of objection to these votes, and purposed to enter into the question, whether the lands were held *immediately* of the lord of the manor? which was objected to by the counsel for the sitting members; 1st. because it was a matter of *title* cognizable by the courts of law, and therefore not a proper question to be discussed in a committee of

the House of Commons; and 2dly, because the question had already been raised and decided at the trial at *nisi prius*, of an information, in the nature of a *quo warranto*, before Mr. Justice Burrough, at the preceding summer assizes for the couny of Cornwall *.

* The *King* v. *Graham* (8). This was an information, in the nature of a *quo warranto*, calling upon the defendant to shew by what authority he exercised the office of port-reeve of the borough of Fowey; and it was tried before Mr. J. Burrough, and a special jury, at Bodmin, during the summer circuit, 1818. There were eleven issues upon the record, one of which was, whether the homage by which the defendant was elected port-reeve of the borough, or any of them, were *free tenants* of the borough and manor. It appeared on the trial, that previously to his purchase of the manor and borough under the Land Tax Redemption Act, Mr. Philip Rashleigh being seised in fee of several burgage tenements, parcel of the manor and borough, conveyed them, by lease and release, to certain persons for their lives; and that the titles derived, under such conveyance, were afterwards duly presented at a court of the manor, and the grantees for life were admitted tenants of the Duke of Cornwall. Four or five of these persons were upon the homage which elected the defendant, and it was insisted by Mr. Gaselee, of counsel for the Crown, that they were not free-tenants of the borough, and therefore incompetent to be upon the homage, because the estates upon which they were admitted, being life-estates granted by Mr. Rashleigh, who was then tenant of the Duke of Cornwall, were not held *immediately* of the Lord of the Manor, but of Mr. Rashleigh, by whom they were granted, and in whom the reversion in fee remained; and he contended, that this defect was not remedied by the subsequent conveyance of the manor and borough to Mr. Rashleigh, because the admission having been before, must have been upon the titles then presented, viz. that of tenants for life holding of a mesne in fee, and not of the lord paramount. Mr. Justice Burrough, however, in his charge to the jury, stated his opinion to be, that although these persons were only tenants for life, they were sufficiently free tenants of the manor, for the purpose of being on the homage, to elect a port-reeve, and accordingly directed the jury to find a verdict for the defendant upon that issue, with permission, however, to the counsel for the Crown to take the opinion of the Court of King's Bench upon the point. A verdict was accordingly found for the de-

(8) 5th Aug. 1818.

The counsel for the sitting members argued as follows:

Argument in support of objection.

1. Committees have always acted upon the principle, that "they will not impeach the legal rights of electors at the trial of the elected," where there has been an opportunity of questioning such rights before the proper tribunals. Without such a rule, it would be impossible for them to decide upon all the questions which would come before them; but this rule has been adopted, and acted upon by committees, on many occasions (1). The committee, in the *Fowey case* (2), did not proceed upon the legal question, of what was to be considered an immediate holding, but whether the right of election was or was not in the persons immediately holding, leaving the question of what was an immediate holding, to the proper tribunals. The same rule has been laid down in courts of law. In *King* v. *Latham* (3), and in *Symmen and others* v. *The King* in error (4), and was also recognized in *King* v. *Mein* (5), although Lord Kenyon in that case, refused to extend it to cases where there had been no opportunity to impeach the titles of electors.

(1) 1 Peck. 486.
(2) 1 Peck. 545.
(3) 3 Burr. 1487.
(4) Cowp. 507.
(5) T. R. 59.

2. But in this case, there has been such an opportunity, and they have availed themselves of it. In the case of *King* v. *Graham* (6), this identical question arose, and was disposed of. The issue there, was, whether persons who had elected the port-reeve, having only estates for life, were free tenants of the manor; and the ground taken to show that they were not, was this, namely, that they could not hold *immediately* of the lord, because they were the tenants of Mr. Rash-

(6) Ante.

fendant, on this as well as all the other issues on the record. A new trial was afterwards moved for, in the Court of King's Bench, on the part of the Crown, upon one of the issues, but not upon any issue involving the present question.

leigh, who was the tenant of the Duke of Cornwall. The case was then fully discussed, and after hearing the argument on both sides, Mr. J. Burrough declared his opinion to be, that those persons were *free-tenants* of the manor. A new trial was afterwards moved for, in that case, but it was upon another ground; and this question was never mentioned, which shows that the opinion of the learned judge, with respect to this point, was considered unimpeachable.

The counsel for the petitioners argued as follows: Argument for petitioners.

1. The first objection is, that the committee have no jurisdiction to determine, what is the meaning of the word *immediately*, in a last resolution, because it raises a legal question, which is certainly a new doctrine, and if it were to prevail, it would exclude, entirely, the discussion of last resolutions before committees. But committees are in the constant habit of deciding upon legal questions. In cases of county elections, the titles of freeholders are constantly the subject of dispute; and committees have never refused to decide upon them. The present committee have already decided upon many legal questions. Committees are both judges and jury, and can decide upon law as well as upon facts.

2. As to the case before Mr. Justice Burrough, the present question was never discussed in it; the question there, related entirely to the election of port-reeve, and not to the election of members of parliament, and the point made was, that certain persons who were upon the homage were not free tenants; and the learned judge said, he thought they were sufficiently free tenants for the purposes of that election: he did not decide that a tenant for life holds immediately of the lord paramount, which is the question now before the committee.

The committee determined, that the counsel for the petitioners should be at liberty to go into the legal Decision.

title of the burgage tenure votes, as far as relates to the *immediate* holding of the Duke of Cornwall.

Argument for petitioners, as to the *immediacy* of the tenure.

The petitioners counsel then proceeded to argue this part of the question. The following is the substance of their arguments:—

The words of the resolution are, that the persons qualified to be *port-reeve*, (who are the persons entitled to vote at election, as Prince's tenants,) are such Prince's tenants only, whose lands are held *immediately of the Duke of Cornwall* (7); so that, upon this resolution, even if grantees for life, of a mesne lord, can be said to hold of the lord paramount, the terms of the resolution are not complied with, because it appears, by the evidence, that they hold of Mr. Lucy, and not of the Duke of Cornwall. No man can legally represent the Duke of Cornwall, as lord of a manor, unless the manor has, by some legal means, passed out of the Duke of Cornwall; and, of that, there is no evidence in the present case. It is true, Mr. Lucy, or any other person, may represent the Duke of Cornwall to a certain extent, by becoming lord *de facto*: but he never can become lord *de jure*, without showing a proper conveyance, or that he has been so long in the possession of the manor, or in the exercise of acts of seigniority, as will induce the committee to presume, that it has passed out of the duke by some legal means, neither of which has been done in the present case; so that all Mr Lucy has established at present is, that he is lord *de facto*. But he has not shown that he represents the Duke of Cornwall, *de jure*; which it is necessary he should do, to entitle persons holding of him, to vote according to the terms of the resolutions.

(7) Ante. p. 127.

But if the committee are satisfied, that Mr. Lucy is not only lord *de facto*, but *de jure* also; then we contend, that these persons are not such tenants as are entitled to vote, because they do not hold *immediately* of Mr. Lucy, as lord of the manor. What

we contend, is, that the estates, in respect of which these persons have voted, being estates for life, granted to them by Lane, who is tenant in fee of the lord, are not held of the lord, but of Mr. Lane. The statute of *quia emptores* does not apply to estates granted for lives, or in tail (8). It is a principle of law, that, if there be a lord and tenant, and the tenant grant for life, reserving the reversion in himself, the grantee for life does not hold of the lord, but of the tenant, in whom is the reversion, and who holds of the lord (9). In this case, Mr. Lucy is the lord, and Mr. Lane the tenant, and he has granted the estates for life, reserving the reversion in himself; so that the grantees for life do not hold of Mr. Lucy, but of Mr. Lane. The resolution says, that the voters must hold *immediately* of the lord; and these persons cannot be said to hold immediately of Mr. Lucy, either in the popular, or in the technical sense of the word. Dr. Johnson defines the popular sense of *immediately* to be, "without any intervening cause or effect." Can it be said here, that there is nothing intervening between Mr. Lucy and the voter? Is there no *lord paravail*? In its technical sense, the word, immediately, means, when there is no one intermediate between the lord paramount and the tenant. It is in this sense, that Blackstone says, "all lands are held *mediately*, or *immediately*, of the Crown" (1); can it be said, that, in this sense, the voter holds immediately of Mr. Lucy? It is in this sense that it is used by Sir Edward Coke, when he says, that "it is a maxim in law, that no man shall attorne to any grant of any seigniorie, rent, service, reversion, or remainder; but he that is *immediately* privie to the grantor" (2). He is there speaking of a case put by *Littleton*, "where there is a lord and tenant, and the tenant has let the land to another for life, (as in this case,) or has made a gift in tail, and reserving the reversion in himself," and he says, that "there is no privitie between the lord and the tenant for life, or

(8) 2 Inst. 505.

(9) Litt. sect. 554. 557. 2 Inst. 505. 2 Rol. Ab. 501. 2 Lord Raymond, 864.

(1) 2 Bl. Com. 59.

(2) Co. Lit. 311 a.

donee in tail, but only between the lord and him in the reversion; for, in this case, the attornement of him, in the reversion only, is good" (3). This is a strong illustration of the present case; but the words of the resolution itself afford one still stronger. The resolution makes it a condition precedent, that the voter must have done his *fealty*. It is therefore important to consider what tenants are bound to do *fealty*, because these tenants only, who are bound to do *fealty*, can be said to have done it within the meaning of this resolution, and to whom it is to be done.

(3) Co. Lit. 311 a.

Co. Lit. 93. (a.)

In Littleton, sect. 131, and in Sir Edward Coke's Commentary upon it, it is said that fealty is incident to all manner of tenures. In this case, there is undoubtedly a holding between Mr. Lucy and Lane, out of which arises tenure, and to this tenure, fealty must be incidental; there is, also, a holding between Lane and the voter, to which fealty is also incidental. "Tenants for life hold of the grantors by fealty, and such other reservations as are contained in the deed by which the estate is created, and where there is no reservation, they hold by fealty only (4)." Fealty is also inseparably incident to the reversion (5). In this case, therefore, the lord of the manor has granted a portion of the manor to Lane, in fee, and Lane has granted an estate to the vote for life, reserving the reversion in himself; the voter must hold of Lane, and Lane of the lord, otherwise the voter must hold of two lords, which no man can do (6); besides, the tenant for life may hold by different services from that by which his grantor holds. The grantor may hold by knights service, and the tenant for life in socage; can it be said that the lord paramount will be entitled to both services; on the whole, therefore, it is clear that the fealty, in this case, must be due to the lord from the mesne, and not from the tenant for life; and if this be true, the converse is also true, that the fealty of the tenant for life is due to the mesne,

(4) 1 Cruise, 62.

(5) 2 Cruise, 458.

(6) Co. Lit. 152.

and not to the lord paramount, consequently, according to the terms of the resolution, Lane is the only person entitled to vote in respect of these lands, he being the only person who could do fealty to the lord, and therefore, the only person holding *immediately* of the lord.

The terms of the resolution are clear and conclusive; they apply to the person who holds, and not to the land holden; otherwise, the subsequent words, which direct that the land shall be "parcel of his said manor of the said borough, are superfluous." The decision of Mr. Justice Burrough cannot affect the present question. The committee have the exclusive privilege of deciding upon the right of voting, independently of which, the case of *King* v. *Graham*, was entirely *res inter alios acta*, and referred merely to the election of port-reeve, and not of members to serve in parliament. If the committee were to consider themselves bound by that, they would in effect say, that the opinion of a judge at *nisi prius*, is to repeal an act of parliament; which says, that the resolution of a committee, on rights of election, are binding to all intents and purposes. A committee will certainly hear the opinion of any judge with respect, and before they pass a resolution contrary to it, they will weigh the matter well, but they will take care to be satisfied that the evidence before the judge, was the same as that upon which they are to decide, and that the material facts are the same; but here we do not know what the evidence before the judge was, we do, however, know that one material fact was totally different; in that case, the election of a port-reeve was under consideration; in this, that of members to serve in parliament.

Argument for sitting members.

The following is the substance of the argument for the sitting member:

Not one of the authorities which have been cited for the petitioners, applies to the present case. We do not dispute any of them, but we say they refer to a totally

distinct branch of law, from that with which the present case is connected. The authorities cited, all apply to the common English tenures, which have their origin in the feodal system, introduced by William the Conqueror; but it is well known, that there were tenures existing before the conquest, which continued, and still remain, unaffected by the feodal law. Of this description, is the custom of *Borough English*, a treatise on which, is to be found in the appendix to Robinson on *gavelkind*. When, therefore, reference is made to authorities, it should be distinctly stated, what the description of tenure is, which is under discussion. The cases which have been cited, apply to the common tenures, by which lands are held in England; but we say that these lands are governed by different rules.

Robinson on gavel kind. Appendix.

Robinson says, that the custom of Borough English is so recognized by the law of this country, that the courts will take notice of it without its being specially pleaded; and then he goes on to describe some special kinds of Borough English, of which the law will not take notice, except they are specially pleaded; and amongst these, he mentions the custom of a manor in the dutchy of Cornwall, that an estate in fee, in lands, shall go to the youngest son, but if in tail, to the heir, at common law. This shows, that there are customs within the dutchy of Cornwall totally at variance with the common law, by which lands in other parts are regulated. The fact is, that all the tenements, in respect of which these persons claim to vote, are burgage tenements; they are so described in the court-rolls, and no common law conveyance has been put in to show the contrary. The only evidence of title which has been adduced, in respect of these votes, are customary admittances upon the rolls of the manor, in which they are described as burgage tenements; this, therefore, is a totally distinct species of property from that, to which all the cases cited, apply. They are burgage tenements, parcel of

a manor, to which all the customs of that manor must apply (7). This authority shews, that with reference to property coming within the description of burgage tenements, the common law does not apply, but it is governed by a law of its own. There is also another description of property recognized by the law, called customary *freeholds*, which are different from copyholds in this only, namely, that copyholders hold at the will of the lord, but freeholders do not; they are, however, admitted at the lords court, in the same manner as copyholders, so that it is of very little importance in this case, whether these tenements are of burgage tenure, or not, it is sufficient, if they are customary freeholds; in either case they are not regulated by the law of the land, but by the particular customs of the manor. It is one of the requisites to a customary freehold, that the tenant should be admitted at the court of the lord. One of the issues sent down for trial before Mr. Justice Burrough (8) was, what was the custom of the manor? which shews that the case was to depend upon the custom of the manor. No attempt was made at the trial, to shew that the rules of the common law applied to these tenements, nor was any such attempt made on the motion for a new trial. In customary freeholds, admission at the lord's court is as essential an ingredient to the title of a tenant, as the conveyance; the conveyance only entitles him to come to the lord, and say, I have had such and such a tenement conveyed to me, and I demand to be admitted to my suits and services; and it is those services which constitute his title: he cannot dispose of his property till he has been admitted, and till then the common law conveyance has no operation, but that of giving him the right to present himself to the lord, and demand admission, upon which only his title depends (9).

(7) Lit. Sect. 162. 165.

(8) *King* v. *Graham*. *ante*, p. 155.

(9) *Parman* v. *Bowyer*. Cro. Eliz. 668. 5 Rep. 84.

It has been said, that there is no privity in this case between the lord and the tenant, and certainly, if this

had been a mere common law conveyance, there would have been no privity; but here he is bound to present himself to the lord, and immediately, on his presentment, his title becomes perfect by admission, and, from that time, he holds of the lord. At all events, the voters are entitled to the fullest presumption, that there votes are good; and the *onus* of proving the contrary lies on the other side (1), and, unless they succeed in doing that, all these voters must be presumed to be clothed with all legal requisites.

(1) *Cirencester case*, 2 Fraser, 448.

It has been said, that these persons do not fulfil the terms of the resolution, because they hold of Mr. Lucy, who is not lord of the manor *de jure*, but *de facto*; but there is no evidence here to show, that Mr. Lucy is not lord *de jure*. It is not contended, that the tenants must hold of the Duke of Cornwall himself, but it is said, they must hold, either of the Duke, or of the actual lord of the manor, and that Mr. Lucy, of whom they appear to hold, is not lord. Their failure in proving the deed of conveyance to Mr. Rashleigh, does not show that Mr. Lucy is not lord, but only that Mr. Rashleigh was not lord. No connexion has been shewn between Mr. Lucy and Mr. Rashleigh; and the only evidence which has been produced, *i. e.* the court rolls, shews that Mr. Lucy is the lord of the manor. But whether the Duke of Cornwall, or Mr Lucy, be lord of the manor, makes little difference, as all the authorities agree in laying it down, that the admissions of a lord *de facto*, even where he holds tortiously, are binding upon the lord, who has the right (2). This will leave the question merely upon the ground, whether the voters do or do not hold *immediately* of the lord, whoever he may be.

(2) Co. Lit. 58, (*b*). 1 Rep. 140. (*b*.) 1 Watkins, 401.

In order to understand what the meaning of the word *immediately*, in the resolution is, it is necessary to refer to the circumstances under which the resolution was passed. It is to be observed, that the word immediately,

is not used either in the first or the second resolution, respecting the right of voting in Fowey. The first resolution declares the right of election to be in those Prince's tenants, who are capable of being port-reeves of the borough; the second resolution describes the Prince's tenants, capable of being port-reeves, as such tenants only as have been admitted on the rolls, and have done fealty; and then comes the third resolution, in which we find the word immediately, but if we look to the report of that case (3), we shall find at once the solution of the term. That case did not turn upon any tenancy for life. The question was not, whether persons, admitted as tenants to the lord paramount, were to be permitted to vote; but, whether those were to vote who were admitted tenants to Treffry, who held a manor *paravail*; so that the resolution merely meant, that those only were entitled to vote who did suit and service to the lord of the manor of Fowey, and not those who did suit and service to the manor of Mr. Treffry. Those persons were admitted on the court rolls, not of Fowey, but of Mr. Treffry; but these voters were admitted on the court rolls of Fowey. So that it is clear that the word, "immediately," is used in the resolution in its popular sense, and means, held *directly* of the lord of the manor of Fowey, in contradistinction to a holding of Mr. Treffry, who was not lord of the manor of Fowey, but of another manor carved out of it. The counsel for the petitioners have endeavoured to make use of a technical argument to get rid of the popular sense in which the word *immediately* has been used in the resolution; and, in so doing, they have been obliged to resort to the law of feodal tenures; but the law of feodal tenures has nothing to do with this case, these being customary freeholds, and as such, they must depend upon the custom of the manor of which they are holden. That these are customary freeholds, has been shown by the court rolls, which they themselves have put in. If

(3) 1 Peck. 512.

the petitioners intended to rely on the common law conveyances, they should have produced them, but they only produced the court rolls, which prove our case.

Decision. The committee determined, that the thirty-four burgage tenure-votes should be struck off the poll.

State of the Poll. After this resolution, the state of the poll remained as follows:—

Mr. Lucy - - - -	56
Colonel Stanhope - - -	55
Lord Valletort - - -	66
Mr. Campbell - - -	66

Sitting members give up their case. The counsel for the sitting members then informed the committee, that, in consequence of their last determination, they had considered the state of the sitting members case, and would not give the committee any further trouble.

Resolutions. The committee then came to the following resolutions:—

That George Lucy, Esquire, was not duly elected a burgess, to serve in this present parliament for the borough of Fowey, in the county of Cornwall.

That the Honourable James Hamilton Stanhope was not duly elected a burgess, to serve in this present parliament for the said borough.

That Alexander Glynn Campbell, Esquire, was duly elected, and ought to have been returned a burgess, to serve in this present parliament for the said borough.

That Lord Viscount Valletort was duly elected, and ought to have been returned a burgess, to serve in this present parliament for the said borough.

The committee also resolved, that the petitions, and the opposition to them, were not frivolous or vexatious.

Incidental points. In the list delivered in by the petitioners, of the seventy-nine votes proposed by them to be placed on the poll of Lord Valletort and Mr. Campbell, as scot and lot voters, a person was described as *Thomas* Watty;

Lists. Identity.

but, upon referring to the corresponding number upon the poll, and poor's rate of March 1818, there appeared the name of *Francis* Watty. The committee permitted the counsel for the petitioners to go into evidence, to shew his identity.

Identity.

Another person was described in the list as William Nicholls *the younger*, and, in the corresponding number on the poll, there was the name of William Nicholls *the elder*; and, on the rate, William Nicholls only. It appeared, that there were two persons of the name of William Nicholls in the parish. The committee determined, that this person should be struck off the list.

Demand, and refusal to pay rate

Refusal.

In all the cases where the committee rejected votes, offered to be placed on the poll, because they had not paid the rate of March 1818, a *personal demand, and refusal* to pay was clearly established *. Where, however, a demand was proved, and no payment appeared to have been afterwards made, the committee held, that the subsequent non-payment amounted to a refusal; although no positive refusal was proved to have been given at the time of making the demand.

Wm. Tacey's vote.

Richard Leane's vote.

And where the voter had a bill upon the parish, for shoes furnished by him to the paupers, and gave that as a reason for his refusal; the committee admitted his vote, although the amount of his bill did not exceed half of what was due from him for rates. In another case, the voter occupied reateable property, but was rated for other property not in his occupation, and had given notice of appeal from the rate on that ground. On the rate of March 1818 being demanded, he refused to pay it, alleging, as a reason, that he was not rated for property he held. The committee admitted his vote.

Chas. Bishop's vote.

* This decision of the committee has since received the sanction of the opinion of the present Lord Chief Justice of the King's Bench. Vide *Cullen* v. *Morris*. Note, post.

Demand on wife.

In general, where the officers only demanded the rate of the wife of the voter, the committee admitted the vote, although the rate remained unpaid; but where it appeared, that the husband was a fisherman, and mostly away from home during the day, and that the wife kept a small shop, and generally paid the rates and taxes, a demand upon her was held sufficient, to exclude the vote of her husband.

Francis Watty's vote.

NOTE.

CULLEN *v.* MORRIS.

THIS was an action brought by a person of the name of Cullen, against Mr. Morris, the high bailiff of Westminster, for maliciously refusing to permit him to give his vote, as an inhabitant paying scot and lot, at the last election for members to serve in parliament for that city. The cause came on for trial before the present Lord Chief Justice of the King's Bench, and a special jury, at the London sittings, previous to Hilary Term 1820, when two questions were raised: 1st. Whether the plaintiff had a legal right to vote?—2dly. Whether the high bailiff, in rejecting his vote, was actuated by malicious motives? Much evidence was gone into at the trial, with regard to the second point, which it is unnecessary to detail here, as the question of malice was left by the learned judge, entirely to the consideration of the jury, who, for the reasons after stated, did not come to any decision upon the subject. With respect to the first point, the circumstances of the case, as they were detailed in evidence, appeared to be as follows: The election took place on the 15th February 1819; and the candidates were, the Hon. George Lamb, and John Cam Hobhouse, esq. On the 23d, Mr. Cullen tendered his vote at the hustings for Mr. Hobhouse, but the collector of the parish, in which he resided, objected to the admission of his vote, on the ground, that he had not paid his poor rates, for three quarters of a year preceding. On the objection being taken, the plaintiff did not go round to that part of the hustings where the high bailiff usually sits, as is always done by persons whose votes are objected to at the Westminster elections, but went away,

and on the 27th, he called upon the collector and paid him the amount of four quarters of a year's poor rates (there being only three quarters then due from him); after which he again tendered himself to vote for Mr. Hobhouse, but his vote was rejected by the deputy high bailiff, who acted as assessor to the high bailiff on that occasion. It appeared from the evidence of the collector, that he had applied at the plaintiff's house for the rates, on two several days, the 9th October 1818, and the 29th January 1819; but that he did not see the plaintiff on either occasion, or leave any written memorandum of the object of his visit; nor did he ever make a personal demand upon him for those rates, and that whenever he had applied to him personally for his rates, he had always paid them, unless he happened to be particularly engaged.

The counsel for the plaintiff, *Mr. J. Blackburne*, in his address to the jury, contended, that the mere non-payment of rates was not sufficient to disfranchise a voter. That the statute 3 W. III, c. 2, sect. 6, enacted, "that if any person, should come to inhabit in any town or parish, should be charged with, and pay his share towards, the public taxes of the said town or parish, such person should be adjudged and deemed to have a legal settlement there;" and that it could not be said, that if he had paid, and was still liable and able to pay, the settlement was taken away, because, some portion of a rate might be unpaid; and that if mere non-payment did not deprive a man of his right of settlement, which merely determined where a person was to live, it could not deprive him of his elective franchise, which was of so much greater importance. That in the *Shaftesbury case*, in 1813 (1), a committee of the House of Commons had resolved, that the non-payment of rates, if the person was liable to pay, was no disfranchisement of the voter; and that as far as regarded the practice in Westminster, no such practice as was contended for, had existed previous to the last election, no objection having ever been made, to receive the vote of a person capable of paying, merely because he was in arrear; unless there had been a demand, and a positive refusal to pay, and that in this case, no demand or refusal had been proved to have been made.

(1) Appendix.

The counsel for the defendant, *Mr. Scarlett*, relied on the

stat. 26 Geo. III, c. 100; and contended, that the words, "previous to the day of election," in that statute, referred to the day of the first commencement of the election, and that it had been so construed in committees of the House of Commons (2); and that if the construction were otherwise, great mischief might arise, especially in such a place as Westminster, as a man's vote might become of such a value, if he could keep it back to the last day of an election by non-payment of his arrears, that it might afford the greatest possible temptation to bribery. That in the *Bridgewater case* (3), where this had been decided, the right of voting was precisely the same as in the city of Westminster, and that it did not appear what the right of voting in the *Shaftesbury case* was. That it was incumbent upon the plaintiff to prove, either that he had paid the rates before the day the election commenced, or that he had tendered them; that it was quite clear that he had not paid them, and that there was no evidence to show, that he had tendered them. That committees of the House of Commons had determined, that where a man tenders his vote at an election, and it is objected to, because he has not paid his rates, and comes again at a posterior period of the same election, and shews, that in the interval, he has paid up the rates, he shall not be allowed to vote (4); and that it was quite another case, whether it be, or not, proper to reject a vote, where the payment is made before coming up to vote at all.

(2) *Seaford case*, Simeon, 129, n. 2d edit.

(3) 1 Peck. 101.

(4) *Bridgewater case*, 1 Peck. 108.

The Lord Chief Justice, in his charge to the jury, after stating the facts, as they appeared by the evidence, made the following observations upon the law, as it applied to this part of the case. "It is contended by the learned counsel for the defendant, that, upon the construction of an act of parliament passed in the reign of King William the Third, the plaintiff had not a right to vote at this election. The right of voting at elections, is peculiarly a subject for the Commons House of Parliament, and no decision which you can come to here as a jury, or in any court of Westminster Hall, on the right, is absolutely binding on the House of Commons, or on a Committee of that House, to whom all questions respecting contested elections are referrred. But according to the statutes, which have made special and particular provisions on this

subject, I am called upon to give you my opinion, whether the plaintiff had by law a right to vote at that election; and considering that he had actually paid rates for some years before, and that, for the year in question, no personal demand had been made on him, or any written paper left at his house, informing him that his rates were in arrear, and although a demand might have been made at his house, but which he might have been ignorant of, I am of opinion, in point of law, that the plaintiff had a right to vote at that election, at least the second time he went; and I give you that as my opinion on that part of the case. For it is necessary to decide first, whether he had a right to vote; for if he had not, he cannot maintain his action. I tell you my opinion, in point of law, is, that he had a right to vote: I mention that to you thus distinctly, in order that the learned counsel for the defendant may, if he thinks I am wrong in that, take those measures which are best to correct the mistake. Considering then, that he had, in point of law, a right to vote at this election; then comes another question, whether the action is maintainable against the defendant, under the circumstances which have been detailed to you, in refusing his vote.

His lordship then commented at great length, upon that part of the case which related to the question of malice, and he left entirely for the jury to say, whether, upon the evidence of the fact before them, they thought the refusal of the defendant to receive the vote of the plaintiff, was founded on any improper motives on his part, which induced him to do so.

The jury then requested to retire; and, after being out about two hours, a paper was sent into court to the learned judge, signed by all of them, stating, that there was no probability of their agreeing, and earnestly requesting that they might be allowed to separate without giving a verdict. Upon this paper being submitted by the judge to the counsel on both sides, they consented that a juror should be withdrawn.

CASE X.

CITY OF WORCESTER.

The Committee was chosen on Tuesday the 16th of March, and consisted of the following Members:

Alexander Baring, Esq. (*Chairman.*)	Earl of March,	
Roderick Macleod, Esq.	Lord Geo. William Russell,	
Joseph Cripps, Esq.	Hon. Robert Smith,	
John Nicholas Fazakerley, Esq.	Hon. Richard Neville,	
John Broadhurst, Esq.	Charles Edmund Rumbold, Esq.	
Thomas Dundas, Esq.	Thomas Frankland Lewis, Esq. for the Petitioners.	Nominees.
Robert Frankland, Esq.	Lord Viscount Althorpe, for the Sitting Member.	Nominees.
George Richard Phillips, Esq.		

Petitioners: Electors.

Sitting Member petitioned against: Thomas Henry Hastings Davies, Esq.

Counsel for the Petitioners: Mr. Harrison, Mr. Courthope, and Mr. Mence.

for Col. Davies: Mr. Warren, Mr. Oldnall Russell, and Mr. G. R. Cross.

Petition. THE petition complained, that Colonel Davies had been guilty of bribery and treating at the last election for members to serve in parliament for the city of *Worcester*; and that, by such means, he had procured himself to be returned.

It has been thought not necessary to give a detailed account of the evidence adduced in support of the charges of bribery and treating, contained in the petition; but that it will be sufficient shortly to notice one of the charges made on behalf of the petitioners, namely, that Colonel Davies had been guilty of bribery, in paying

for the admissions of voters during the election; this being a point on which, hitherto, there has been no express decision *.

The substance of the evidence, applicable to this part of the case, was as follows:—That many persons were admitted to their freedom immediately previous to, and during the election, whose admissions were paid for by Mr. Griffith, an agent of Colonel Davies. The cost of an admission, where the claim arose, either from birth or servitude, was 1*l.* 11*s.* 6*d.*; when obtained by purchase, four guineas. The election began on the 16th of June, and ended on the 23d. On the 15th of June, it appeared, that Mr. Griffith paid 15*l.* 15*s.* for admissions; on the 17th, 12*l.* 12*s.*; on the 18th, 22*l.* 1*s.*; the 19th, 20*l.* 9*s.* 6*d.*; the 23d, 7*l.* 17*s.* 6*d.*; the 24th, 7*l.* 17*s.* 6*d.* It was also stated, that between the first Monday in January, and the close of the election, 400 persons were admitted to their freedom; and that Mr. Griffith had paid for nearly half that number, some at his own house, some at the council-board, and twice, during the election, in a back room in the house where the committee of Colonel Davies sat. With the exception of four votes, it did not appear under what circumstances the freedoms had been given to the voters; and, of those four, two were admitted in January, one at Easter, and one only after the *teste* Evidence.

* In the case of *Bristol*, 1786, it appeared, that many persons who voted for the sitting members had been admitted to their freedom during the election, and that their admissions were paid for by a subscription, raised by the committee of the sitting members. It did not, however, appear, that the sitting members were parties to the transaction; or that any promise of support was either exacted from, or given by, those voters whose freedoms were so paid for. The committee decided, that the sitting members were duly elected; but it does not appear, whether that resolution was founded on the ground, that the sitting members themselves were not implicated, or that they considered no engagement to have been entered into, as the consideration for which the freedoms were given.

of the writ. John Probard was admitted the day before the election, when Mr. Griffith told him, he would settle for the expence of taking up his freedom, and desired him to come that night, at eight o'clock, to receive the freeman's oath. In consequence of which, he went at eight, and was sworn in; after which, he was desired to go to the committee-room; and, the next day, he polled a plumper for Colonel Davies.

Argument for the petitioners.

It was contended, on behalf of the petitioners, that if a candidate paid for the admissions of freemen, it must be considered bribery; and that although no direct promise could be proved, on the part of the persons admitted to vote for Colonel Davies, as the condition on which they were presented to their freedom, yet that the object for which their freedom were taken out and paid for by Colonel Davies was so palpable, that the committee must necessarily draw the inference, that such freedoms were given with a view to influence and secure the votes of those persons to whom they were presented.

Argument, for the sitting member.

For the sitting member, it was argued, that allowing Colonel Davies had paid for the admission of numerous voters during the election, which fact had not been proved, (the cases of four voters only having been inquired into, of whom one alone was admitted after the *teste* of the writ,) still that would not be sufficient to constitute bribery, unless some corrupt promise or undertaking was shown to have been given, in consideration of which, the voters had been presented with their freedoms. That no case could be shown, in which a candidate has been held to have been guilty of bribery, merely from the fact of having paid for the freedoms of persons who subsequently voted for him. But from the decision in the *Bristol case*, it would appear, that the committee did not consider those voters bribed, whose freedoms were given to them during the election.

Resolution.

The committee resolved, that Colonel Davis was duly elected.

CASE XI.

BOROUGH OF TRURO, IN THE COUNTY OF CORNWALL.

The Committee was chosen on the 4th of May 1819, and consisted of the following Members:

Richard Hart Davies, Esq. (*Chairman.*)	Charles Palmer, Esq.
Sir Isaac Coffin, Bart.	Edmund Turton, Esq.
Robert Price, Esq.	John Gordon, Esq.
James Martin Lloyd, Esq.	Wm. Tierney Roberts, Esq.
Wm. Augustus Montague, Esq.	Sir Edward Buller, Bart.
Henry Bruen, Esq.	William Henry Whitbread, Esq.
Geo. Macpherson Grant, Esq.	Walter Burrell, Esq.
	George Banks, Esq.

Petitioner: John Jervis Benallock.
Sitting Members: Lord Fitzroy James Henry Somerset and William Edward Tomline, Esq.
Counsel for the Petitioner: Mr. Warren and Mr. Harrison.
for the Sitting Members: Mr. Serj. Pell, Mr. Gaselee, and Mr. G. R. Cross.

Objection lists not delivered within the time required by 53 Geo. III, c. 71.

No decision took place upon the merits of this petition a preliminary objection being taken by the counsel for the sitting members, to the delivery of the list of votes, objected to by the petitioners; which, it was contended, had not been delivered to the clerk of the House of Commons, within the time required by the 53d Geo. III. c. 71; that statute enacting, that in all cases of controverted elections, all parties complaining of, or defending such elections, shall deliver in to the clerk of the House of Commons, lists of the voters

intended to be objected to, to be by the clerk kept in his office, open to the inspection of all parties concerned; giving in the said lists the several heads of objections, and distinguishing the same against the names of the voters excepted to, and that such lists shall be so delivered in, where the petition relates to any election for Scotland, or for any county in England or Wales, ten days at least, before the day appointed for the consideration of the petitions; and in all other cases of controverted elections for England or Wales, *five days at least*, before the day appointed for the consideration of such petition. The list, in the present case, was delivered to the clerk of the House of Commons, at half past three on Thursday, the 29th of April; the 4th of May being the day appointed for the consideration of the petition, by which means, only four clear days intervened between the day of delivery, and that on which the petition was to be taken into consideration. And it was contended, that the words "five days at least, before the day appointed for the consideration of such petition," could not be construed to mean five days *inclusive* of the day of delivery, but that the statute must be understood as requiring five clear days, *exclusive* of the day of delivery.

Resolutions. The committee resolved, that the list of objections delivered in to the clerk of the House of Commons, by the petitioner, was not delivered in in due time, according to the provisions of the act of the 53d Geo. III, c. 71, sec. 1.

The committee further resolved, that the sitting members were duly elected; and that the petition did not appear to be frivolous or vexatious.

END OF PART I.

CASE XII.

THE BURGHS OF INVERKEITHING, STIRLING, DUMFERMLINE, CULROSS, AND QUEENSFERRY.

The Committee was chosen on the 18th of February 1819, and consisted of the following Members:

John Bacon Sawrey Morritt, Esq. (*Chairman.*)
Sir Wm. Henry Clinton.
George Mundy, Esq.
John Ramsbottom, Esq.
Edward John Littleton, Esq.
Sir Wm. Champion De Crespigny, Bart.
John Fleming, Esq.
Lord Viscount Glerawley.
James Hunter Blair, Esq.
Benj. Lester Lester, Esq.
Henry Fynes, Esq.
George Gipps, Esq.
Earl Temple.
J. Henry Smyth, Esq. for Sitting Member. } Nominees.
Sir George Clerk, Bart. for Petitioner. } Nominees.

Petitioner: The Hon. Francis Ward Primrose.
Sitting Member: John Campbell, Esq.,
Counsel for Mr. Primrose: Mr. Warren and Mr. Adam.
Counsel for the Sitting Member: Mr. Harrison, Mr. Campbell.

THE petition stated, that at the last election of a commissioner to serve in this present parliament for the class or district of royal burghs in Scotland, consisting of Inverkeithing, Stirling, Dumfermline, Culross, and Queensferry, which was held at Inverkeithing, the returning burgh, on the 11th day of July 1818, the petitioner and John Campbell, Esquire, were candidates. That the petitioner, as the delegate for Inverkeithing, and James Gibson, Esquire, as the delegate for Culross, voted for the petitioner to be the commissioner to represent this class or district of burghs in parliament; and Thomas Littlejohn, pretending to be delegate for Petition.

the burgh of Stirling, David Wilson, pretending to be delegate for the burgh of Dumfermline, and Campbell Innes, pretending to be delegate for the burgh of Queensferry, voted for the said John Campbell to be such commissioner; and the petitioner, as delegate for the returning burgh, gave a casting vote in favour of himself, in the event of its afterwards appearing that there was an equality of legal votes; but the returning-officer declared the said John Campbell to be duly elected, and was accordingly returned as such commissioner as aforesaid. That the election of the said Campbell Innes, as such pretended delegate for the said burgh of Queensferry, was brought about, procured and obtained by means of gifts, loans and rewards, and of promises and agreements for gifts, loans, offices and rewards made by the said John Campbell the candidate, and by the said Campbell Innes, or their agents: and that the election of the said John Campbell, as representative of the said class or district of burghs in parliament, was also brought about, procured and obtained by means of sums of money, gifts, loans and rewards, and of promises and agreements for sums of money, gifts, loans, offices and rewards, given and made, as well to persons being electors or delegates for the burghs aforesaid, as to certain of the said delegates, by the said John Campbell, or by some person or persons as his agent or agents, or manager or managers, or acting on his behalf.

Points insisted upon.

The grounds of complaint against the return of the sitting member insisted upon at the hearing were: 1. That the election of Mr. Campbell Innes to be delegate for the burgh of Queensferry, had been procured by means of bribery and corrupt promises on the part of Mr. Campbell Innes: 2. That the return of Mr. Campbell himself, as representative of the district of burghs in parliament, was brought about by means of bribery and corrupt promises on the part of Mr. Campbell him-

self. In either case the petitioner claimed the seat: 1. Because Mr. Campbell Innes's election, as delegate for the burgh of Queensferry, having been procured by bribery and corrupt promises was void, and the number of good votes for each candidate equal, and therefore the petitioner, as delegate for the presiding burgh of Inverkeithing, having given the casting vote in his own favour was duly elected, and ought to have been returned; 2dly, Because the corrupt practices of the sitting member, in order to procure the return, were notorious to the delegates who voted for him, and therefore their votes in his favour were thrown away, and ought to be considered as not having been given.

Facts of the case.

It appeared that the election of a delegate for the burgh of Queensferry took place on the 22d June 1818, and that of the commissioner to be returned to parliament on the 11th July. On that occasion the delegate for Culross, and the petitioner, as delegate for Inverkeithing, voted for the petitioner; and the delegates for Stirling and Dumfermline, and Innes, as delegate for Queensferry, voted for the sitting member. The petitioner, as the delegate for the presiding burgh, gave his casting vote in favour of himself, in the event of its afterwards appearing that there was an equality of legal votes; each of the other delegates, as is usual in all elections of representatives for each district of Scotch burghs, claiming the casting vote for himself, and giving it, in case of an equality of votes, in favour of the person for whom they originally voted.

Campbell Innes' case.

In order to establish the fact that the election of Innes, to be delegate for Queensferry, had been effected by means of bribery and corrupt promises on the part of Innes himself, the petitioner's counsel called a witness of the name of Stuart, who stated, that he was a councillor of the burgh, and as such had a vote in the election of a delegate for that burgh. That, shortly before the election, Innes had called upon him, and

proposed to him to sign a declaration, by which he should pledge himself to vote only for such a person to be delegate as would support the interest of Mr. Campbell. That to induce him to sign such declaration, Innes said, that others had done so, and that he, Stuart, should be as well off as any of them. That it was not in his power to give him any thing at present, but that if he would sign it he would give him a letter to a Mr. Dallas, Mr. Campbell's agent, to say that he had behaved handsomely. That in consequence of this, he, Stuart, signed the paper, upon which Innes wrote a letter and directed it to Mr. Dallas, in which he stated that Stuart had behaved handsomely and signed the declaration. This letter was delivered by Innes to his son, who came in at that time, to be delivered by him to Mr. Dallas; Innes, at the same time, desiring his son to tell Mr. Dallas of Stuart's handsome behaviour.

Gowie's case. With respect to the sitting member himself, it was in evidence, that he had personally applied to a person of the name of Gowie, one of the members of the town-council of the burgh of Inverkeithing, and told him that he had considerable interest with the East India Company, and that if he, Gowie, would support his interest in the election of a delegate for the burgh of Inverkeithing, he would make use of his interest with the East India Company in his favour, and that he had it also in his power to procure a situation in the Customs, which he would get for him if he wished it, or would do any thing that might be in his power to serve him, after he should be member. That the same offer was likewise repeated by Mr. Hutton, who was also proved to have acted as the agent of Campbell, and who likewise at several times offered Gowie various sums of money for his vote, but which Gowie declined, and voted for the petitioner.

Todd's case. The petitioner's counsel also called a person of the name of David Todd, who was likewise one of the

town-council of the burgh of Inverkeithing, and whose father was senior baillie of that council at the time of the election. He proved, that, previously to the election, Campbell called upon him, and offered that if he and his father would be his friends, he, Campbell, would apply to Lord Melville, then the first Lord of the Admiralty, to advance him in the Navy Office, in which office Todd then held the situation of a clerk. That Hutton, Campbell's agent, also called upon him, and proposed that if he would promise not to come forward against Campbell, and to get his father to vote for him, he would discharge a debt for which Todd's father was at that time liable to be arrested. That he, Todd, assented to such proposal; whereupon Hutton went away, but shortly afterwards returned, and threw on the table a parcel of bank notes which he left upon the table. That Todd afterwards counted the notes, and found that they amounted to 290*l.*, which not being sufficient to discharge the debt, Todd sought and procured another interview with Hutton, and told him that he had not advanced sufficient money, upon which Hutton gave him as many more notes as, together with the sum already advanced, made up the sum of 350*l.* That Hutton afterwards gave him 20*l.* more to defray the expences of his going to Dumfermline to settle his father's affairs, and from time to time advanced other sums to Todd towards discharging his father's debts. That the sums paid to Todd by Mr. Hutton amounted to 500*l.* and upwards, but that notwithstanding, both Todd and his father voted for the petitioner to be delegate for Inverkeithing. In the course of his evidence, Todd stated that he had never communicated these transactions to his father during the time they were taking place; and also that at the time of voting he did not consider that he was entitled to vote, because he was

not a resident voter. The bribery oath was not administered to Todd at the election; but he said that if it had, he would have taken it.

Proceedings at the election.

It also appeared in evidence, that Mr. Primrose, in the presence of all the delegates, publicly charged Mr. Campbell and Mr. Innes with having been guilty of bribery, and that the charge was denied by Mr. Campbell.

Argument for petitioner.

Upon this evidence the counsel for the petitioner argued as follows: We contend that the petitioner ought to be seated; 1st, because he had the majority of legal votes, and ought to have been returned; 2d, because, although the numerical majority of votes was against the petitioner, yet Mr. Campbell's conduct was so notorious that he ought not to have been returned.

1. Upon the first ground we say, that Mr. Campbell Innes was not legal delegate of the burgh of Queensferry, consequently there was an equality of votes, and the petitioner having had the casting vote, and having given it in his own favour, ought to have been returned. The ground upon which we contend that Innes was not legal delegate for Queensferry is, that he was guilty of bribery.

It is laid down in all the books, that bribery, though in a single vote, renders an election for members to serve in parliament, void; and by 16 Geo. II, c. 11, 2 G.II. c.24. the provisions of the Bribery Act, are extended to the election of delegates in Scotland. It is said in (1) 346. Wight(1), that a promise, even if retracted, has been held sufficient to reduce an election; and that it is enough if the promise has had, or is presumed to have had, an influence upon the votes of the electors. In this case it is clearly proved: that there was such a promise to Stuart, as induced Stuart to give his vote for Innes, it is established beyond dispute; that Innes proposed to Stuart to sign the declaration, and that he said he should

be as well off as any others who should sign it: he also said, that it was not in his power to give him any thing at present, but that he would give him a letter to Mr. Dallas; and that the letter was written to Dallas, in which Innes informed Dallas that Mr. Stuart had come forward handsomely and signed the declaration, wherein he said, that Stuart should be as well off as any that signed the declaration; he must have had some meaning; what meaning could he have, but that Stuart should derive some benefit from signing it? It has been proved that Dallas was agent for Mr. Campbell, and Stuart must have known that he was so; what, therefore, was Stuart to conclude from this? he was told that he should have a letter to Dallas, and that he should be as well off as other people that had signed the declaration; he knew that Dallas was agent for Campbell, and that other people who had signed the declaration were well off; he was naturally, therefore, to conclude that he was to be put upon the same footing with the others; this shews that Innes made use of corrupt promises to induce Stuart to vote for him; the question is not whether this promise was ever performed, but whether Stuart would have voted for Innes if he had not received the letter to Dallas, and the assurances to Innes? it is not necessary now to shew that Campbell was privy to all this; all we have to do at present is, to shew that Innes procured the vote of Stuart by means of a corrupt promise; and we say, that if Innes procured a vote by means of a corrupt promise, his election was void, and he was not a delegate.

The election for Scotch burghs is regulated by statute, and that statute declares, that in case of an equality of votes, the president shall have the casting vote: our proposition, therefore, is, that if Innes' election was procured by bribery, he was no delegate; and, 5 Anne, c. 8.

therefore, there was an equality of votes, and consequently Mr. Primrose, as delegate for the presiding burgh, had the casting vote. Will it be said, that this clause of the act applies only to the burghs where there are four delegates? The act itself negatives that, because it says, that, "where the votes of the commissioners for the said burghs, &c. shall be equal, &c.," thereby referring specifically to all the district of burghs which are before enumerated. Can it be contended, that because five persons are in a room, there cannot be an equality of votes? But the statute expressly says, *votes*. Supposing Innes had been a collector of Excise, would his vote have been good? A person guilty of bribery is as much disqualified by law as a revenue-officer. If he had been a minor, he could not have sat in parliament, and if he was disqualified from sitting in parliament, he was just as much disqualified from voting as delegate. Wherever a person is not capable of doing the duty of an office *quoad* that office, he is a dead man. We have shewn that Innes was disqualified by bribery from holding the office of delegate; the election, therefore, must be considered as if it had been conducted by four only; and in that case Mr. Primrose ought to have been returned.

2. We have not only proved that Innes was guilty of bribery, but we have shewn that Campbell, as well in person, as by his agent, was contaminated with it.

(2) P. 346. According to Wight (2), as we have before shewn, a promise to do any good deed is bribery. In *Vaughan's case* (3), it was determined, that the offer of a bribe to a privy councillor, to advise the King to do any particular act, although the bribe be not accepted, is an offence; and if it was criminal in that case to solicit the Duke of Grafton to take a bribe to advise his Sovereign, it was equally criminal in this case to offer a bribe to Mr. Gowie to give his vote. *Vaughan's case* is not the

(3) *King* v. *Vaughan*, 4 Bur. 2494.

only one in which it has been decided that an offer is bribery (4). The resolution of the House of Commons which is read at the commencement of every parliament (5), declares, that if any person thereafter to be elected, &c. shall make any present, gift or reward, or any promise, obligation or engagement to do the same, to any person or persons having a voice at such elections, such present, gift, reward, promise, obligation or engagement is declared to be bribery, and sufficient grounds to make such election void as to the person so offending. This shews that bribery, even in one instance, is sufficient to avoid any election, and so, therefore, must be the offer of a bribe. Now we have proved that Mr. Campbell offered to give Gowie a place, and we have also proved that Mr. Campbell's agent made more than four distinct offers of money to Gowie for his vote; this is amply sufficient to bring the case within the principles before laid down; but if any thing were wanting to bring home the fact of bribery to Mr. Campbell, we have the evidence of Todd, which proves that there was a bribe completed by the payment of the money. There is no doubt that Todd was a competent witness to prove his own bribery(6); the only objection which can be made to his evidence is, that, at the time he received the money, he thought he was not entitled to vote, because he was not resident in the burgh; but it is clear that residence is not necessary to a man's being a member of the council of a Scotch burgh (7); but whether he had a vote or not, he did vote, and his name appears upon the poll, which is sufficient to complete the crime of bribery (8). It will perhaps be said, that Todd never was bribed; that he always intended to vote for Mr. Primrose, and that the money he received did not induce him to alter his mind; but in *Julston* v. *Norton* (9), it has been decided, that the bribery is complete where the person bribed does

(4) 3 Inst. 147. *Rex* v. *Plymton*, 2 Ld. Raym. 1377.

(5) 9 Journ. 411.

(6) *Ivelchester case*, 1 Peck. 304. *Lee* v. *Gansel*, Cowp. 3.

(7) Bell's Elect. Law, 482.

(8) *Coombe* v. *Pitt*, 3 Burr. 1586.

(9) 1 Bl. Rep. 317.

not vote according to the bribe; and in *Bush* v. *Rawlins* (1), the doctrine is carried still further; it is there determined, that although the voter never intended to vote according to the bribe, yet he was corrupted.

(1) Cited ib. Sayers, 289.

3. Having brought home the charge of bribery to the sitting member, we say further, that Mr. Primrose ought to have been seated, because notice of the bribery was given at the time of the election. It is quite clear, that if the record of a conviction for bribery had been produced, Mr. Campbell could not have been elected; and here the bribery was made known in an equally notorious manner; Mr. Primrose declared it at the time of the election: but it is said Mr. Campbell denied it; how then could the voters know what Mr. Primrose said was true? But can it be said that the delegates were not aware of it; at all events, Innes must have known it, and that would have been sufficient to have disqualified his vote. In *Wilkes's case*, the notoriety of his disqualification was held sufficient ground to avoid his election, and to seat his opponent. In the *Kirkcudbright case* (2), the disqualification of Mr. Gordon was stated at the election, and the committee seated his opponent. In the *Southampton case* (3), the principle was admitted to be, that "where there is a legal incapacity, the fact of a candidate's being under such incapacity is known, the votes given for him are thrown away." The same principle was acted upon in the *Canterbury case* (4). It will be said, that in all those cases there was some record produced, as evidence of the disqualification, at the time of the election: but in the *Fife case* (5), there was a mere verbal intimation of the fact, and there was also a denial of the disqualification on the part of General Skene. The *Aberbrothock case* (6), and the cases of *King* v. *Blissel* (7), and of *The King* v. *Hawkins* (8), all shew that it is not necessary to produce

(2) 1 Lud. 72.

(3) 4 Ld. Gl. 87.

(4) Clifford, 358.

(5) 1 Lud. 455.

(6) 1 Peck. 99. 1 Heyw. 362. 25 Journ. 667.

(7) 1 Heyw. 537.

(8) 10 East, 211. Ante 8, *notis*.

the judgment of a court, but that if the disqualification of the candidate be notorious, the votes are thrown away (9).

(9) *Taylor* v. *The Mayor and Aldermen of Bath*, 3 Lud. 324. *King* v. *Coe*. 1 Hey. 537. *King* v. *Parry*, 14 East, 549. *Flint case*, 1 Peck. 526. And vide note to *Radnorshire case*, 1 Peck. 496; and to the *Leominster* and *Penryn cases*, ante.

Argument for sitting member.

The following is the substance of the argument for the sitting member:—

1. Admitting it to be true that Innes did bribe Stuart, we say that circumstance alone cannot invalidate his election. As delegate for a burgh, he was in fact nothing more than an elector of a candidate, and is entitled to all the privileges of an elector. One elector is not disqualified if he bribes another elector (1); it therefore can be no disqualification if Campbell offered to bribe another voter. A delegate gives his vote as that of the majority of electors who elected him; to invalidate his vote, therefore, it is necessary to shew that the majority of voters who elected him were obtained by corrupt means. All the evidence against Innes is confined to an attempt to bribe one person; but what was done with regard to one person can only affect the vote of that one person. What was done with regard to Stuart can only affect the vote of Stuart, and not the votes of the other eleven councillors of that burgh, otherwise the greatest injustice would be done to the other eleven. But there is no case of bribery made out against Innes, even in the instance of Stuart. There was not even a specific offer. All that was said to Stuart amounted merely to a general intimation that his voting for Innes might be of service to him, and there can be no impropriety in electors voting for those who can attend to their interest.

(1) *Coventry case*, 1 Peck. 98. *Bridgewater case*, ib. 102.

2. With respect to Mr. Campbell's bribery, there is no proof of any specific offers having been made to Gowie; all that is proved to have taken place between Mr. Campbell and Gowie, was a conversation, in which

some general offers of advantage were made; and an offer does not come within the words of the act (2). But it is said on the other side, if an offer does not come within the words of the act, it does come within those of a particular resolution of the House of Commons (3); but it must be recollected, that that resolution afforded the foundation of the act, and that we must therefore interpret the resolution by the act. The only difference between the act and the resolution is this: the resolution says, that if a person shall before any election, &c. make any present, gift or reward, or any promise, obligation or engagement to do the same, &c. it is declared to be bribery. The act says, it must be done with a view to the election; but offers are not within the provisions either of the act or of the resolution; a specific promise would come within them, but a mere offer on one side, and not accepted on the other, will not. In the *Barnstaple case* (4), notwithstanding repeated offers were proved, the committee seated Sir Edward Pellew; but in this case there is not even a specific offer. It was argued in that case, that it would be a very dangerous and unjust thing to leave a candidate, who in the course of his canvass must solicit the votes of a number of persons, at the mercy of any one of them who could be brought to swear that he accompanied his solicitation with the offer of a bribe; that risk would be run by the committee in the present case. Upon the authority of that case, which has never been overruled, it is quite clear that a mere offer is not considered by committees to be tantamount to a bribe. We do not deny the cases which have been cited to be law, but we say that the principles contained in those cases have never been adopted by committees. But it is said that, in the case of *Todd*, Mr. Campbell went beyond mere offers, and that a sum of money has actually been proved to have been paid: what credit, however, can be attached to the testimony

(2) 2 Geo. II. c. 24.

(3) 9 Journ. 411.

(4) 1 Peck. 91.

of such a man as Todd, uncorroborated as it is? He is not confirmed in his testimony in any one instance. There is no doubt that accomplices may be admitted as witnesses in a court of justice (5), but it is well known that the practice is not to believe their testimony unless it be corroborated, and that corroboration must not be in some collateral facts which are not material, but in facts that are material, because a witness may state facts that are true and found upon them circumstances that never had any existence. We have a right here to consider Todd as an accomplice; and considering him as such, his evidence cannot be credited, because it has not been corroborated.

(5) *King* v. *Rudd*, Cowp. 331.

3. But even if the committee should be of opinion that the fact of bribery has been brought home to Mr. Campbell, we say that the effect of it is merely to unseat Mr. Campbell, and that Mr. Primrose is not entitled to the seat. The proposition which has been contended for on the part of the petitioner is quite new, and none of the cases which have been cited afford any foundation for it. In the case of *Taylor* v. *The Mayor and Aldermen of Bath* (6), the ineligibility arose from the candidate's not being a member of the corporation, which was a legal disqualification, and must have been known upon inspection of the corporation books. In *King* v. *Hawkins* (7), the question was asked at the election, whether one of the candidates had taken the sacrament? and upon his answering that he had not, it was contended that the election was void, since it must have been notorious to every body that the taking of the sacrament was material. In this case, there was an assertion on one side, and a denial on the other. What could the electors do? With reference to electors, it never can be contended that a subsequent decision of a committee can have a retrospective operation, to deprive them of their franchise. There is no case which goes

(6) 3 Lud. 324.

(7) 10 East, 211.

to that length, and there are many cases the other way. In the *Southwark case*, there was a judgment against Mr. Thellusson, and a notoriety attending that judgment, which electors were bound to take notice of. In the *Flint case*, the fact of Sir Thomas Mostyn's being under age, was notorious; and it was not denied by any body; and if a disqualification is stated and not denied, it must be taken as admitted. In the *Radnorshire case*, the committee only avoided the election. All the cases say, there must be such a notoriety of the disqualification, as must render it evident to all the electors at the time of the election. In the *Fife case*, the fact was admitted by General Skene. To make the cases parallel it should have been shewn, that Mr. Campbell, instead of denying the bribery, admitted it; otherwise there is no resemblance between them. There should be either a notoriety of the fact, or an admission of the fact, coupled with law, which cannot be disputed, and must be known to every body.

Decision. The committee determined, that John Campbell, Esquire, had been proved guilty of bribery at the last election of a commissioner for the burghs of Inverkeithing, Stirling, Dumfermline, Culross, and Queensferry.

Resolutions. The resolutions of the committee, as reported to the House, were,

That John Campbell, Esquire, was not duly elected a commissioner to serve in this present parliament for the class or district of burghs of Inverkeithing, &c.

That the Honourable Francis Ward Primrose was not duly elected a commissioner to serve in this present parliament for the said class or district of burghs.

That the last election for the said class or district of burghs was void.

That neither the petition nor the opposition to it were frivolous or vexatious.

In the course of the evidence it was proved, that twelve of the twenty-one members of the town-council for the burgh of Inverkeithing had signed a paper or agreement, by which they agreed to vote for no person, to be delegate for that burgh, who would not give his vote in favour of Mr. Campbell, as the commissioner to be returned to parliament; and it was insisted by the counsel for the petitioner, that the signature of such an agreement was illegal, and avoided the election, on the authority of the *Kinghorn case*, and *Stirling case* (8).

Agreement signed by electors.

The committee, however, without hearing the counsel for the sitting member on that point, determined, that the signature of that agreement by the members of the town-council was not illegal.

(8) Bell's Elect. Law, 480. Vide etiam, 2 Ld. Glenb. 218, n.

CASE XIII.

THE BOROUGH OF BARNSTAPLE, IN THE COUNTY OF DEVON.

The Committee was chosen on the 4th day of March 1819, and consisted of the following Members:

Lord Viscount Clive, (*Chairman*).	Sir Thomas John Tyrwhitt Jones, Bart.	
John Mansfield, Esq.	Hon. John Bridgman Simpson.	
Hylton Jolliffe, Esq.	Earl Compton.	
Marquis of Worcester.	Thomas Fowell Buxton.	
Thomas Braddyll, Esq.	Hon. Hen. Grey Bennett, for the Petitioner.	Nominees.
Hon. Seymour Thos. Bathurst.		
Hon. Wm. Henry Percy.	William Holmes, Esq. for the Sitting Member.	
Thomas Wood, Esq.		

Sitting Members: Sir Manasseh Masseh Lopes, Bart.
Francis Molineux Ommaney, Esq.

Petitioner: Sir Henry Clements Thompson, Knt.

Counsel for the Sitting Members: Mr. Harrison, Mr. Wilson.

Counsel for the Petitioner: Mr. Warren, Mr. Pemberton.

Petition.

THE Petition contained general charges of bribery against both the sitting members; but the petitioner's counsel, in his opening speech, stated, that it was not his intention to bring any proof of the charges contained in the petition as far as related to Mr. Ommaney; in consequence of which, the counsel for the sitting members requested the committee would, in the first instance, come to a resolution, that Mr. Ommaney was duly elected, to which the counsel for the petitioner consented. The committee, however, determined, that they could not take any notice of the declaration of the counsel, that evidence would not be adduced against Mr. Ommaney.

Case abandoned as to Mr. Ommaney.

Committee refuse to declare Mr. Ommaney elected.

In the course of the subsequent proceedings, the nominee for the petitioner put some questions to one of the witnesses, tending to bring home the charge of bribery to Mr. Ommanney, to which an objection was taken by a member of the committee; but the committee determined, that the questions and answers to them should not be erased from the proceedings; and the chairman was directed to inform the counsel, that the committee could not exclude any evidence affecting the general corruption of the borough, whether implicating Mr. Ommanney or not. Evidence received against Ommanney.

It appeared by the evidence, that Sir M. M. Lopez had given bribes to a considerable number of the electors, through the agency of two persons of the name of Wilkinson and Gribble; but the only point which occurred worthy of particular attention was, that the committee, after argument, permitted the petitioner's counsel to give evidence as to the acts of bribery before the agency was proved. Acts of bribery proved before agency.

The committee resolved, that Sir Manasseh Masseh Lopez, Bart. was not duly elected a burgess to serve in this present Parliament for the said borough. Resolutions.

That Francis Molineux Ommanney was duly elected a burgess to serve in this present Parliament for the said borough.

That the last election for the said borough, so far as related to the said Sir M. M. Lopez, was void. And

That the petition and opposition to it were not frivolous or vexatious.

The committee also came to the following resolutions, which they directed their chairman to report to the House: Special report.

Resolved,

That it appears to this committee, that Sir Manasseh Masseh Lopez, Bart. was, by his agents, guilty of bribery and treating at the last election for the borough of

Barnstaple, and is thereby incapacitated to serve in Parliament at such election.

That it appears by evidence before this committee, that such a general system of corruption was practised at the last election for the said borough of Barnstaple, as to render it incumbent on the committee to submit the same to the serious consideration of the House, in order that such proceedings may be instituted thereon, as the House in its wisdom may think proper.

Parliamentary proceedings.

9th March.—The report was made to the House, and it was ordered to be printed, together with the minutes of the proceedings of the committee. It was also ordered, that the Speaker should not issue his warrant for a new writ till the ensuing Tuesday; and from thence the issuing of the writ was further postponed from time to time to the 2d April, when the Attorney General was ordered to prosecute Sir M. M. Lopez for bribery at the last election for the borough of Barnstaple, and leave was given to bring in a bill for the preventing of bribery and corruption in the election of members to serve in parliament for that borough, which was done on the 26th April, when the bill was read a first time, and a printed copy of it was ordered to be served on the mayor of Barnstaple, who was directed to affix notice of the day appointed for the second reading of the bill on the doors of the town-hall and parish church of the borough. The bill was read a third time and passed on the 10th May. It was read twice in the House of Lords and committed, but from the advanced period of the session, it was not considered likely that the bill would pass that House before the prorogation; in consequence of which, it was on the 14th July ordered, that the Speaker should not issue his warrant for a writ for the borough of Barnstaple till fourteen days after the commencement of the next session of parliament.

CASE XIV.

THE TOWN OF LANCASTER, IN THE COUNTY OF LANCASTER.

The Committee was chosen on Wednesday, March 30, 1819, and consisted of the following Members:

Lord Visc. Lascelles, (*Chairman.*)
Sir William Congreve, Bart.
Sir Edward Knatchbull, Bart.
Sir John Perring, Bart.
Hon. Charles Paget.
Sir James Montgomery, Bart.
Kirkman Finlay, Esq.
Lord Viscount Cranborne.
Alexander Boswell, Esq.
John Archer Houblon, Esq.
Lord Viscount Normanby.
Sir Mark Masterman Sykes, Bart.
William Tyrwhitt Drake, Esq.
Richard Ellison, Esq. for the Petitioners. } Nominees.
Edw. Bootle Wilbraham, Esq. for the Sitting Members. } Nominees.

Petitioners: Electors.

Sitting Members: General Doveton and John Gladstone, Esq.

Counsel for the Petitioners: Mr. Warren and Mr. F. Pollock.

for General Doveton: Mr. Serj. Blosset and Mr. Serj. Bosanquet.

for Mr. Gladstone: Mr. Harrison and Mr. Joy.

Petition.

THE Petition complained of bribery and treating on the part of the sitting members, at the last election for the town of *Lancaster*.

Facts of the case.

The committee were chosen on the 30th of March; on the 31st the petitioners commenced their case, and proceeded to give evidence on that and the following day, to substantiate the charges contained in the petition. The committee met again on the 2d of April, when a witness was examined, after which, about 11 o'clock,

Mr. Warren stated to the committee, that want of money rendered it absolutely impossible for the petitioners to proceed. Upon which the committee resolved, that the sitting members were duly elected; and further, that the petition was frivolous and vexatious.

As no decision took place on the charges contained in the petition, it has not been thought necessary to state any of the evidence received in this case.

Incidental points:

Publicans examined.

The committee resolved, that publicans may be examined as to their houses being opened.

Production of papers.

It appeared that two persons, of the names of Lewson and Birkett, clerks in the bank of Mr. Dilworth, a banker at Lancaster, had been served with the Speaker's warrant to attend and give evidence, and also to produce papers and documents. Birkett was the head-clerk, and had the custody of the books and papers belonging to the bank; both Birkett and Lewson attended, but neither of them produced any papers or other documents, which, it was contended on behalf of the petitioners, they were bound to have done. The committee, however, were of opinion, that the warrant's not having been served on Dilworth, and not requiring Dilworth's books, &c. to be brought up, did not compel or authorize these witnesses to bring the books.

CASE XV.

TOWN OF NOTTINGHAM.

The Committee was chosen on Tuesday the 9th of March, and consisted of the following Members:

Thomas Grimston Estcourt, Esq. (*Chairman.*)
George Sinclair, Esq.
Arthur Howe Holdsworth, Esq.
John Pearse, Esq.
Sir Lawrence Vaughan Palk, Bart.
Hon. Charles Cecil Cope Jenkinson.
Davies Gilbert, Esq.
John Fownes Luttrell, Esq.
Sir John Shelley, Bart.
Ebenezer Fuller Maitland, Esq.
Charles Tennyson, Esq.
Luke White, Esq.
Hon. Hercules Robert Pakenham.
Sir John Osborn, Bart. for the Petitioners. } Nominees.
Lord Visc. Folkestone, for the Sitting Member. } Nominees.

Petitioners: Electors.

Sitting Member petitioned against: Lord Rancliffe.

Counsel for the Petitioners: Mr. Warren and Mr. Harrison; in the absence of either, Mr. Courthope.

for the Sitting Member: Mr. Serj. Bosanquet and Mr. G. R. Cross.

THE Petition complained of an undue return of Lord Rancliffe, to be one of the sitting members for the town and county of the town of *Nottingham*, and claimed the seat for Thomas Assheton Smith, Esq. another of the candidates. There were various grounds of complaint stated in the petition, upon none of which was any decision come to by the committee, the case having been disposed of upon the following objections to the form of the petition:— Petition.

Objections taken to the form of the petition, after the committee had sat for five days.

The petition was intituled, "The petition of Richard Reckless, of Cheapside, in the city of London, hosier, and James Edenborough, of Fore-street in the said city of London, gentleman, who are electors and persons having a right to vote, and who did vote at the last election of members to serve for the *said* town and county in this present Parliament:" and stated, "That at the last election of members to serve in this present Parliament, for the *town and county of the town of Nottingham*, &c. (1); but in the writ and return to it, the election was stated to be for the *town* of Nottingham: an objection was therefore taken, on the part of the sitting member, to the petitioners proceeding with their case:—

(1) 74 Jour. 73.

1. Because it did not appear by the petition, that the petitioners were persons having a right to vote for Nottingham.

2. Because the petition stated, that the election was for *the town and county of the town* of Nottingham, whereas it ought to have been for the *town* of Nottingham only.

These objections were not taken till after the committee had sat for more than five days, and had made considerable progress in the examination of the witnesses in support of the petitioners case. The counsel for the petitioners, therefore, objected to the sitting member's counsel being heard as to these points, on the ground that it was too late to take an objection to the form of the petition, after the case had been gone into.

Allowed to be argued.

The committee, however, resolved, that the counsel for the sitting member should be heard in support of their objections.

Argument for sitting members.

The counsel for the sitting member then argued as follows:

1. The first objection is, that this does not appear to be the petition of electors of the town of Nottingham.

The act(2) says, that the petitioners must claim *therein*, that is, in the petition, to have had a right to vote at the election to which the same shall relate; but in no part of this petition does it appear that the petitioners had any claim to vote at the last election for the town of Nottingham. The petitioners are described as persons having a right to vote for the *said* town and county; and there is nothing to which the word *said* can refer, but the city of London, in which the petitioners are described as residing: there is not even a marginal reference to the town and county of Nottingham. (2) 28 G. III. 52.

2. The next objection is, that supposing the petitioners to be sufficiently described, the place at which the election took place is not. It is described in the petition as "*the town and county of the town of Nottingham*;" whereas the fact of its being such, is distinctly disproved by the writ and return, in which it is called the *town* of Nottingham only. From time immemorial, the *town* of Nottingham has returned burgesses to sit in parliament; and unless prevented by the authority of an act of parliament, must continue to do so; and although the town was erected into a county by *Henry* VI, the burgesses continue to sit for the town. In many instances, the king has granted a manor co-extensive with a borough, as in the case of Fowey. But the burgesses sit for the borough, and not for the borough and manor. In this case, the writ is issued for the town of Nottingham only.

This is not an objection which is merely technical. Suppose an action were to be brought upon the statute for bribery committed at this election, and it was stated in the declaration, that this was an election for the town and county of the town, but upon producing the writ it should appear that it was an election for the town only, the defendant in such case must be acquitted,

It is possible that perjury may be committed before this committee, and if it were, and a prosecution were to be directed, the consequences must be, an acquittal because it would appear that this petition complained of an undue election for the town and county of the town of Nottingham, whereas it could be proved, that there never was an election for such a place; so that the advantages of the Grenville Act would be completely lost.

Argument for the petitioners.

The following is the substance of the argument of the counsel for the petitioners:

1. Committees of the House of Commons are not confined to the same technical rules as the courts of common-law. In the *Middlesex* case, the same objection as that now taken, was overruled (3) by the House; and in the *Caermarthenshire* case (4), a similar objection was taken, and disposed of in like manner. In the *Boston* case (5), it was objected that the petitioners did not comply with the terms of the act, because they did not claim to have had a right to vote at the time of the election; but merely stated themselves in the petition to be persons *having* a right; and the objection was overruled. In the *Cricklade* case (6), the committee allowed the petitioners to go into evidence of bribery by the sitting member, although there was no express charge of bribery in the petition, it being held, that it was comprized under the term *corrupt practices*. All these cases shew that committees will not entertain mere technical objections. At all events, if this objection should prevail, it is a mere question of fact, and the petitioners would have a right, under the 53 Geo. III, s. 19, to be examined for the purpose of proving that they were persons having a right to vote.

(3) 1 Peck. 294.

(4) 1 Peck. 289.

(5) 1 Peck. 434.

(6) 4 Ld. Gl. 55.

2. With respect to the second objection, the writ does not supersede the evidence of the poll-book, which calls it a county election, and states that it was done

at the county court. In the *Chester* case(7), the writ was not given in evidence; which, if it had been considered as admissible, would have been done in order to supply the want of the poll-book; and so in the *Limerick* case(8). In the last petition which was presented against the return for this place(9), the election was described as an election for the town and county of the town of Nottingham, and no objection was taken at the hearing. If this had been a borough only, the writ would have been sent to the sheriff of the county, who would have sent his precept to the returning-officers of the borough; but here the writ goes at once to the sheriffs of Nottingham. What has been said with respect to an indictment for perjury, does not apply. Supposing an indictment were to be presented for perjury, on the hearing of this petition, it would be merely necessary to allege in it, that at a trial of a petition respecting an election for the town and county of the town of Nottingham, and no variance would occur.

(7) Ante, p. 68.

(8) Ante, p. 89.

(9) 63 Journ. 15.

Decision.

The committee determined, that the petition was not conformable to the provisions of the 28 Geo. III, c. 52, s. 1; and that the petitioners should not be allowed to proceed.

Incidental points: Lists.

As from the manner in which the petition was framed, it was conceived that a question might arise, whether this was to be considered as a petition relating to an election for a county, or for a town, the agents for the sitting member, in pursuance of the provisions of the stat. 53 Geo. III, c. 71, delivered in to the clerk of the House, a list of objections intended to be taken on behalf of the sitting member, to the votes, of various persons who had voted for Mr. Smith, ten days before the day appointed for taking the petition into consideration, being the time when, according to the provisions of the statute, lists are to be delivered; in petitions relating to county elections; and on the 3d March,

List of objections delivered in within ten and above five days before hearing, admitted.

being six days before the day appointed for considering the petition, they delivered another list, containing objections to other votes than those included in the first list; but the counsel for the petitioners, as soon as he had concluded the opening of the petitioners case, took an objection to the list delivered on the 3d March, as not having been delivered in due time, this being, as he contended, a petition relating to a county election; whereupon the counsel for the sitting member submitted, that then was not a proper time to go into such a question, as the lists were part of the sitting member's case, and it could not appear, till his case was opened, whether the list would be made use of or not; and that the time for objecting to it would be, when it was attempted to be made use of. The committee, however, resolved, that they would then hear counsel, as to whether the list of objections delivered in by the sitting member on the 3d March, was or was not due time.

Objection to sitting member's lists argued before the opening of his case.

The counsel for the petitioners then proceeded to argue the question as to this list, and, in so doing, endeavoured to establish that this was a county election. The counsel for the sitting member, on the other hand, contended, that this was an election for a borough, and that the list having been delivered in six days before the consideration of the petition, was in due time: and the committee determined, that it was delivered in due time.

Two lists delivered, but both in due time, party not confined to the first.

The petitioners counsel afterwards objected to the sitting member being permitted to make use of both lists, and contended that he ought to be confined to that first delivered in, and heard only thereon; and they urged that, if they were to be allowed to use the second list, it would be a great hardship upon the petitioners, as they had delivered in a list ten days before the hearing of the petition, which gave the sitting member an opportunity of correcting his list by that of the peti-

tioners so delivered in, which was an advantage not authorized by the act of parliament, which intended that the exchange of lists should be mutual.

The counsel for the sitting member contended, that they had a right to make use of the list of 3d March, as well as of the first list. That no surprize or deception was practised upon the petitioners, and that, if there were any deception in the case, it was on the part of the petitioners themselves, who, by delivering in their list ten days before the hearing of the petition, had induced the sitting member to suppose that this would be treated as a county election, and to deliver in their list accordingly.

The committee determined, that the second list delivered in by the agents for the sitting member, was a good list, within the provisions of the act 53 Geo. III, c. 71.

Declaration of voter since the election, inadmissible.

In the course of the hearing of this petition, evidence was offered of an admission by a pauper after an election, that he was a pauper at the time of voting: but the committee determined, that such evidence was inadmissible (1).

(1) 2 Peck. 141.

CASE XVI.

THE BOROUGH OF MILBOURNE PORT, IN THE COUNTY OF SOMERSET.

The Committee was chosen on the 6th day of April 1819, and consisted of the following Members:

Right Hon. Frederick Robinson, (*Chairman.*)
Hon. Pownall Bastard Pellew.
Sandford Graham, Esq.
Wm. Pole T. Long Wellesley, Esq.
Thomas Claughton, Esq.
James Drummond, Esq.
Sir John Jackson, Bart.
George Porter, Esq.
Ronald Geo. Macdonald, Esq.
John Henry Lowther, Esq.
Lord Stanley.
Charles Forbes, Esq.
William Beckford, Esq. whose attendance was dispensed with on account of indisposition.
Ralph Bernall, Esq. for the Petitioners. } Nominees.
Henry Wrottesley Esq. for the Sitting Members. } Nominees.

Petitioners: Electors.

Sitting Members: The Hon. Sir Edward Paget, Bart. and Robert Matthew Casberd, Esq.

Counsel for the Petitioners: Mr. Serj. Blosset, Mr. Harrison, and Mr. Merrywether.

for the Sitting Members: Mr. Serjeant Pell, and Mr. Warren.

Petition.

THE Petition stated, that at the last election for two burgesses to serve in Parliament for the borough of *Milbourne Port*, the petitioners were, and still are, inhabitant householders within the said borough, and paying scot and lot there, and as such were entitled to vote, and did vote at the said election; and that the Hon. Sir Edward Paget, Bart. Robert Matthew Casberd, Esq. Richard Sharp, Esq. and Samuel Moulton Barrett, Esq. were candidates:—

That at the election for the said borough, James Noke

Highmore, gentleman, and John Highmore, gentleman, who illegally took upon themselves to act as the sub-bailiffs and returning-officers at the said election, in taking the poll, had illegally rejected the votes of several persons who had good right and title to vote, and who had tendered their votes for the said Richard Sharp and Samuel Moulton Barrett, Esqrs. and admitted other persons to vote for the said Sir Edward Paget and Robert Matthew Casberd, who had no right to vote at the said election, by which several means the said James Noke Highmore and John Highmore fraudulently contrived that a colourable majority should appear for the said Sir Edward Paget and Robert Matthew Casberd; and that the said James Noke Highmore and John Highmore unduly and illegally returned the said Sir Edward Paget and Robert Matthew Casberd as members to serve in the said Parliament for the borough of Milbourne Port, to the great prejudice, &c. The petition also contained charges of general bribery and corruption, and of unduly closing the poll, but which were abandoned by the counsel for the petioners.

It appeared in evidence, that the election took place on the 18th day of June 1818. The numbers for the respective candidates were, for

Sir Edward Paget - - -	39
Mr. Casberd - - - -	33
Mr. Sharp - - - -	15
Mr. Barrett - - - -	21

Upon which the two former were returned.

The petitioners list contained several heads of objections; but it was agreed that the attention of the committee should first be directed to the case of nine voters, who were objected to on the following grounds: *viz.* "That these nine several persons who voted as capital "bailiffs for the borough of Milbourne Port, are not "seised or possessed of the lands in respect of which "they claimed to be such capital bailiffs; that they are

" not resident within the said borough; and that the " several appointments in respect of which they voted, " are illegal and void, and that they are not duly con- " stituted capital bailiffs of the said borough."

Before the merits of this objection were discussed, it was contended by Mr. Serjeant Pell, on behalf of the sitting members, that the petitioners had not properly specified their objection in the list delivered in as required by act of parliament, inasmuch as there was no allegation that the capital bailiffs *were* not possessed or seised of lands *at the time of the election*, but that they *are not* at the present time. The committee, however, did not consider this as a valid objection on the part of the sitting members.

From the documents given in evidence, and the testimony of the witnesses, it appeared that it had already been a question before the House of Commons, in what description of persons the right of voting for members to represent this borough in parliament was vested. But by a decision of a Committee of the House, in the year 1702, followed by another in the year 1796, the entries of which in the Journals (1) were read, it was finally determined, that the right of election was in the nine capital bailiffs, and their two deputies, in the commonalty stewards, and the inhabitants paying scot and lot.

(1) Vol. 52, p. 191.

Constitution of the Borough.

It also appeared that the constitution of the borough is of this nature: *viz.* There are within the borough nine capital bailiwicks, which received and have retained their names from certain portions or parcels of land lying somewhere in the borough, and known by the names of Sanders, Mildrons, Walcotts, Carents, Caldecotts, Raymonds, Gerrards otherwise Pauncefoots, Huddys, and Mullins otherwise Hermans, being the names of the proprietors of these lands at some former and distant period of time. The boundaries of these lands, however, have long since been confused, and all traces of them lost, nor can it now be ascertained which

are the specific lands, nor in what part of the borough they are situate. Of these nine bailiwicks there are nine capital bailiffs, of whom two only in each successive year, in a certain known course of rotation, exercise any office in the borough. These two are termed reigning bailiffs, and enter upon their office on the first Tuesday after a certain annual fair, held at Sherborne, in Dorsetshire, on the first Monday after Michaelmas day, and known by the name of Pack Monday fair. On the same day, each of the reigning bailiffs appoints a deputy or sub-bailiff, at a court-leet holden at Milbourne Port, before a steward or stewards nominated for that purpose by the former sub-bailiffs. The new deputy-bailiffs then take the oaths, enter upon their office, and become in effect the principal acting officers of the borough. They are also the returning-officers, according to a resolution of the House of Commons in the year 1747. The reigning bailiffs do not take the oaths, nor does their office appear to have many important duties attached to it. It appears, however, that they are the persons who execute all leases of certain lands, called the Capital Bailiffs Lands; and also concur with the commonalty stewards in executing leases of the Commonalty Stewards Lands. The persons who, in course of rotation, became reigning bailiffs in October 1817, were John Peters and John Sherring; and at the court-leet then holden, they appointed as their deputy-bailiffs, James Noke Highmore and John Highmore, the returning-officers named in the petition. Some time previous to the election, the Marquis of Anglesea had become and then was the proprietor of these nine bailiwicks; of five as tenant in fee, and of the remaining four under a lease from Sir William Medlycott. The Marquis and Sir William had become the proprietors of all the lands within the borough, including (as was admitted) lands which had formerly belonged to Sir Charles Carteret, who was returned for the borough in the year 1695.

State of the case.

Under these circumstances it was, that the Marquis of Anglesea, shortly previous to the election, executed under his hand and seal the nine several appointments or instruments in writing, under the authority of which, the nine persons had voted, whose votes were the subject of the first and principal objection. One of these appointments or instruments was in the following words: "Know all men by these presents, that I the Most noble "Henry William Marquis of Anglesea, for divers good "causes and considerations me hereunto moving, have "made, constituted, and appointed, and by these pre- "sents do make, constitute, and appoint John Peters, "of Charlton Houthorne in the county of Somerset, yeo- "man, to be one of the capital bailiffs of the town and "borough of Milbourne Port, in the county of Somerset. "And I do hereby give and grant unto the said John "Peters, all privileges, benefits, powers, and authorities "whatsoever, belonging to the said office, for and on "account of Mullins alias Hermans, and all right, title "and interest, which I the said Marquis of Anglesea "have or may claim of in or to the same office: to "have, hold and enjoy the said office, together with all "privileges, benefits, powers and authorities belonging "to the same, from henceforth, for and during the term "of one year, fully to be complete and ended. In wit- "ness whereof, I the said Henry William Marquis of "Anglesea have hereunto set my hand and seal, the "16th day of May 1818."

The appointments of the eight other capital bailiffs, for and on account of the eight other bailiwicks or bailiwick lands, were precisely similar in tenor and effect. It appeared from the evidence of Mr. Castleman, who was the country law agent of the Marquis of Anglesea, that these several appointments had been in the possession of him, Mr. Castleman, for about three weeks preceding the election; that they were delivered by him to the several persons appointed capital bailiffs on

the morning of the election, and were returned to him within half an hour after the poll had closed. It also appeared, that none of the nine persons named in these appointments, were resident in the borough.

The principal documents which were given in evidence on the part of the petitioners, consisted of, Documentary evidence for petitioners.

1. A translation of an extract from Domesday Book, to the following effect:—"*Somerset*—land of the King—"The King holds *Meleburne*; King Edward the Confessor "held it; it never paid geld, nor is it known how many "hides there are." It then stated the particular quantities of arable and demesne lands, and concluded thus: "In the manor are 56 burgesses, and a market, "paying 60*s*."

2. Several extracts from the Hundred Rolls of Edward I, & II, purporting to be "Inquisitions "made by the precept of the king of his rights and "liberties subtracted, and his demesne lands or rents "and other possessions alienated;" in all of which, it was affirmed, on the oaths of certain persons therein named, that "the borough of *Meleburne* is of the de-"mesne of the lord the king, appertaining to the crown;" and in one of them, it was further said, "that Ralphe "Bulle and his ancestors for 16*s*. 3*d*. yearly rent in the "town of *Meleburne*, were bound to do suit, to wit, on "tallage and other things appertaining to the lord the "king, with the other burgesses of the same town; and "now, that he hath subtracted himself for ten years "past, in disherison of the lord the king, and the da-"mage of 12*d*. by year, and as often as the lord the king "was used to tallage the manor and borough, the said "Ralph and his ancestors were used to give half a "mark;" and so on with respect to other tenants.

3. A copy of part of the Roll in the Augmentation Office, dated the 11th of March 1649, and expressed to be made by virtue of an act of parliament for the sale of fee-farm rents, to the following effect:—"County of

" Somerset, parcel of the lands and possessions called " Richmonds Lands. The manor of Milbourne Port " is worth in ———— the fee-farm of the manor " of *M. P.* in the county of Somerset, payable at the " feasts of Easter and St. Michael the Archangel, equally " per ann. 8*l.*"

4. A series of Parliamentary Returns, from the year 1629, down to the year 1807, from which it appeared, that the returns had been made sometimes " by the bailiffs, constables and other burgesses;" sometimes " by the bailiffs, constables and inhabitants;" sometimes " by *A.* and *B.* individual burgesses, with the consent " of the rest of the burgesses;" sometimes " by the bai- " liffs or their deputies, together with the burgesses and " inhabitants." None of these appeared to be signed by persons describing themselves " capital bailiffs," except one, in the 31st year of Charles II, which was signed by " Charles Martin, capital bailiff," and " John " Cary, capital bailiff," and another in the year 1685, which was signed by " Charles Carteret, capital bailiff," and " John Cary, capital bailiff." The others were signed by persons either without any description of office, or describing themselves as bailiffs and constables generally. The object of the petitioners counsel in producing these returns was stated to be, to shew that certain persons were bailiffs, whom they should shew to have been in possession of the lands at the same time.

5. An ancient Paper found in the Commonalty Box, which was in the custody of the commonalty stewards. The paper was dated the 33d of Elizabeth. It was read, to the following effect:

" Borough of Milbourne Port. We have in our bo- " rough, xliij *s.* of rent issuing out of certain burgesses, " which burgesses were given to one John Hooper and " Richard Hawkins, by a feoffment bearing date the " 21st year of king Edward I, 1481, which feoffment

" was made with William Carrent, John Fitzjames, " Henry Burrell, Thomas Rope, clerk, William Tysp, " John Durant and Nicholas Warman. These were " feoffors of trust to the use of the commons of the " borough aforesaid, which land by the burgesses and " commons of the borough aforesaid is governed, which " do yearly choose two stewards, who do give an ac- " count of their profits These words were presented."

" William Raymond and Reynolds Church are now " stewards, and do employ the profits thereof for the " benefit of the poor. And before this year, other of " the burgesses and commons have been stewards, and " have taken the profits thereof, and have employed the " same to the benefit of the poor, and yearly give an " account to the commons thereof. These words were " not presented."

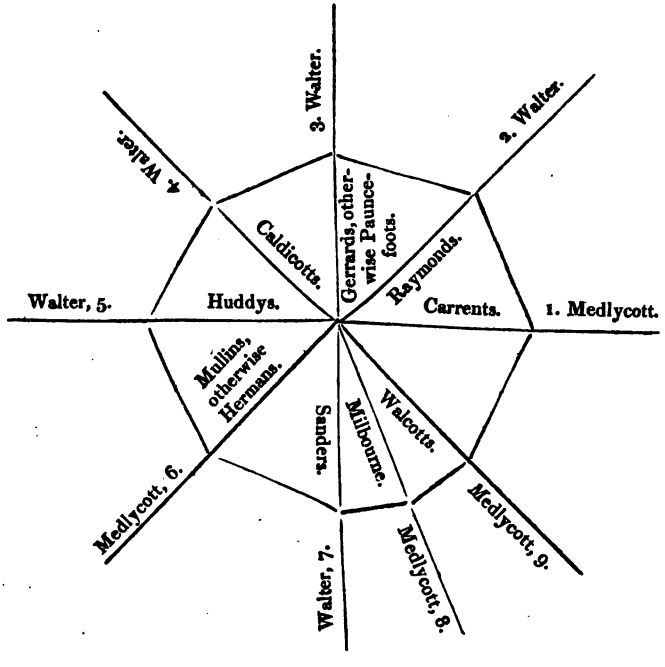
" The profits of these lands were intended, at the " first, to be employed to the use of the poor of the " said borough, and the chief rent and other duties " discharged.

" We have in our borough, nine gentlemen, most of " them worship burgesses and lords of the town, which " dwelling in the town (and in their absence their " deputies) do join the commons as touching the order- " ing and disposing of the said lands; two of the which, " by course, are yearly bailiffs of the said borough, and " pay to her Majesty eight pounds by the year, for the " royalty, freedom and liberty of the same; and the land " aforesaid is yearly charged with the payment of " twenty-three pence to the said bailiffs, a chief-rent " always paid, which rent and other duties discharged, " the residue hath always been employed to the use of " the poor, especially these ten years last past."

This document appeared mutilated, and a pen was drawn through several passages.

6. A paper, produced by the steward of the leet,

which he stated in his evidence had been handed to him with other documents when he became steward; and by which the relation and succession of the reigning bailiffs for the year, among the capital bailiffs is regulated. The following is a copy:



The names within the circumference being the names of the ancient owners; those without, being the names of the owners at the time of constructing this rota.

7. An extract from the Journals of the House of Commons, vol. 18, p. 69, was also read, being the Report of the Proceedings of a Committee of the House, on a petition presented in the year 1717, and was in part to the following effect:—

"It was proved on the petitioners part, and admitted

" by the sitting members, that Mr. Medlycott is one of the " capital bailiffs, which capital bailiffs are by tenure in " right of their estates; and Mr. Medlycott purchased " his capital bailiwick, and has the lands by which he " claims to be capital bailiff."

Evidence for sitting members.

The evidence offered on the part of the sitting members, consisted of

1. Several appointments or instruments under seal, bearing date in the years 1745, 1774, and 1806, which were in terms and effect precisely similar to those of 1818, executed by the Marquis of Anglesea, except only, that in the former instruments, it was expressed that the appointments were made in respect of " *Carrents* " *lands*," " *Walcotts lands*," &c.; in the latter, in respect of " *Carrents*," " *Walcotts*," &c. without the word *lands*."

2. It was also put in evidence, that in those years there were contested elections, and the poll-books of the years 1774 and 1806 were produced, to shew that the persons appointed to be capital bailiffs, by the appointments of those years, had voted as capital bailiffs, and their votes were not objected to.

3. Mr. Batson, who was of the age of 70 years, and a solicitor residing within three or four miles of Milbourne Port, deposed, that he had known the borough all his life; that he never himself knew, nor did he ever know any one now dead who did know, where the bailiwick lands are, nor can they nor could they at any time within his memory, or within the memory of those whom he has known, shew where the lands lie.

Argument on behalf of the petitioners:

Argument for petitioners.

In the first place, the petitioners dispute the legality of the votes given by the nine persons styling themselves capital bailiffs. For this purpose, we must inquire as well into the original nature and constitution of this borough, as into the right of voting at present existing. The borough of Milbourne Port is a borough in ancient demesne. This appears from the extract which has been

read from Domesday Book, and the Inquisitions which have been given in evidence. It is likewise so stated in Brady on Boroughs (1), and other books. The nature of boroughs in ancient demesne is this: they are boroughs which formerly belonged to the king, but the lands in which were, in course of time, granted by the king to certain subjects who became tenants *in capite* of the crown, and held immediately of the king, and not of any other lord, at a fee-farm rent. In right of this tenure, the tenants acquired a right to be summoned, and were under an obligation to appear, when summoned, before the king in parliament. In very early times therefore, these boroughs were represented in parliament; but the right which they had to be so represented, or rather the onus as it was then and might with more propriety be termed, was a territorial right, a right annexed to and connected with the lands which the tenants so held (2). All the history of this borough, all the evidence which has been given, tends to establish the proposition for which the petitioners contend, that this is a borough in ancient demesne, that there are within the borough certain lands formerly the lands of the crown, but afterwards granted out by the crown to certain tenants, at a fee-farm rent of 8 *l.* a large rent for those days: that the lands conferred the right of voting upon the tenants, who voted and possessed the character of voters, by virtue of the lands which they so held, and for which they paid such fee-farm rent; and, consequently, that the foundation on which this borough originally returned members to serve in parliament, was a territorial right, arising in respect of the lands so holden of the crown. In what description of persons then is the right of voting for members vested? It is established by the resolutions of the committees of 1702 and 1796, which have been read from the Journals, that the right of election is "in the nine capital bailiffs, "the two deputy bailiffs, the commonalty stewards, and

(1) Brady, p. 21 & 86.

(2) See Brady, 84. 1 Black. Com. 148. 1 Gordon, 215, 229. Madox Forma Burgi. 1.

"the inhabitants paying scot and lot." But who are these nine capital bailiffs? The petitioners contend, that the persons designated under this term are the proprietors of those nine portions of land in the borough from which it appears the nine capital bailiwicks have taken their names; that it is the ownership of these lands which gives the right to be the capital bailiffs. Capital bailiffs, not indeed of these lands alone, but of the whole borough: not all together or at one and the same time, but in a certain annual succession or rotation, making two in each year the reigning or acting bailiffs for that year: and that the character of bailiffs and the right of voting are connected with the possession of these bailiwick lands. This is proved by the whole body of the evidence. The rota which has been produced, distinctly shews who are the owners of the lands from which these bailiwicks derive their names; and it must be deemed that those persons possessed such lands by payment of the fee-farm rent. This rota also informs us, who were the owners at the time it was constructed. Sir William Medlycott is named as one of such owners: by the entry we have read from the Journals, he is shewn to have been one of the capital bailiffs in the year 1717, because he purchased one of the bailiwicks, *and had the lands by which he claimed to be bailiff.* The payment of this fee-farm rent at a very early period is established by the evidence, and particularly by the extract from the Roll at the Augmentation Office; and the ancient Paper from the Commonalty Chest shews, that the territorial right, which existed long before the date of this presentment, agrees with the presentment: that the proprietors of the lands are remaining tenants in ancient demesne, holding their burgesses, at first, immediately of the crown, and afterwards having taken them from the crown at a fee-farm rent remaining payable for them to the amount of 8 *l.* per annum. That down to the year 1717, the right of

voting was considered to be a territorial right, is quite clear from the entry which we have read from the Journals of that year; for not only is it there stated, "that "the capital bailiffs are by tenure in right of their estates, "and Mr. Medlycott purchased his capital bailiwick, "and has the lands by which he claims to be capital bailiff," but upon a question arising, whether in point of fact other persons who had claimed to vote as capital bailiffs upon that occasion, had or not the lands which made them bailiffs, a witness was called to prove that neither of those persons had such lands, but that all such lands were in Sir Thomas Travell and Mr. Medlycott. The appointments of the year 1806 also shew that down to that period, at least, it was thought necessary to preserve the connection between the capital bailiwicks and the lands; to make the appointments go hand in hand with the *lands*; for at that period the Marquis gives and grants to John Medlycott, all the privileges, benefits, honors and authorities belonging to the said office "for and on account of Sanders *lands*."

With respect to the circumstance attending the election now under consideration, it must be admitted, that the Marquis of Anglesea, as the present proprietor of all the bailiwicks, has, by virtue of the two bailiwicks which come in rotation, the right to appoint the two deputy bailiffs, and consequently to make two voters in each year. But he has assumed the right of naming nine voters, under the plea of appointing nine capital bailiffs! Retaining in his own possession the lands, the ownership of which alone confers the right to be a bailiff, he has, by these incomprehensible instruments, disunited that which he thinks fit to consider the office of bailiff, from the lands which give the right to vote; and without the least regard to the reigning character of the two persons who were duly elected in the preceding October, and who then were invested with the office of reigning bailiffs, he has, on

the very day of the election, virtually attempted to depose them before their reign expired, merely for the purpose of appointing nine voters without an office. For in fact, by these appointments, no office is assigned, no office capable of assignment is in existence. For admitting that the office of capital bailiff could be disconnected from the lands, still, by the constitution of this borough, the nine capital bailiffs are not so many existing officers; they are all termed bailiffs, because they are persons who, in due course of rotation, must be bailiffs; but two only can exercise their office during one and the same period, and their only act of office is, to appoint the deputy bailiffs; they take no oaths, they have no other duties to perform. The deputy bailiffs are the only substantial officers of the borough, they alone take the oaths, they have the management of the election. The Marquis of Anglesea, then, being himself the whole nine bailiffs, or rather the sole perpetual bailiff (because in him would be found, in each succeeding year, the two parcels of land which give the right to be the bailiffs), has by those appointments effected only this, he has created nine voters in a borough where 39 turn the election, while he has himself retained the lands, on the ownership of which the right to vote is founded. But suppose that, after these assignments of the office separately from the lands had been executed, the Marquis had assigned the lands themselves to nine other persons, such persons would, undoubtedly, have been entitled to vote. Is it possible then to say, that he could, by an assignment of the office without the lands, also confer a right to vote? It is a mere nullity.

Besides, these appointments are open to the objection of occasionality: indeed they go far beyond it. Occasionality has been defined by many cases to be the giving a man an estate, in respect of which he will have a right to vote, for the mere purpose of a vote; but still the estate is given. Here, however, no property, no

sign of property, passes; the estate is kept, and nothing is assigned or attempted to be conveyed, but a mere right to vote for a member of the House of Commons; and the moment the election is over, these instruments are again returned to the grantor. This objection is of itself sufficient to destroy these votes.

The counsel for the sitting members argued as follows:—

Argument for sitting members.

This, like other cases of a similar description, is involved in considerable obscurity; but if the return of the sitting members is to depend on the constitution of this borough, that constitution must be ascertained, not by references to Domesday Book, to Brady, to Madox, or to Gordon, but by the last determination of the House of Commons. The difficulty here, does not arise out of the complexity of the return, with reference to who were or were not originally the nine capital bailiffs, or what was the precise constitution of the borough, when it first returned members to parliament. If, however, such references could be material, it might be worthy of observation, that in Brady, which has been cited for the purpose of shewing that this borough is a borough in ancient demesne, and therefore sends members to parliament, Milbourne Port is in fact referred to as a borough which did not send members to parliament; while in Madox, which was cited for a similar purpose, Milbourne Port is not once mentioned.

By the last determination of the House of Commons in 1796, which has been read from the Journals, and which is now the law of Milbourne Port, the right of voting was declared to be in the nine capital bailiffs, together with the other persons there mentioned. But who were the capital bailiffs at that period? The petitioners contend, that it is a territorial right arising in respect of lands; but the question is, Did the capital bailiffs who voted in the year 1796, in any degree differ, in respect of situation or in respect of right, from those who have voted in the year 1818? For if not, (and it

cannot be shewn that they did) this very question was before the committee, and was decided in the year 1796. In Lord Glenbervie's report of the *Milbourne Port* case, the constitution of the borough is stated in nearly the same terms as in the determination of 1796, but not a word with reference to the capital bailiffs being seised of lands. And Serjeant Heywood tells us "that this is a "borough by prescription, and consists of nine parcels "of burgage lands, each of which gives a right to vote. "Each of the proprietors of these nine parcels of lands "appoints a capital bailiff, who is also entitled to vote, "and two of these capital bailiffs preside annually by ro-"tation; and these two may, if they think fit, appoint a "sub-bailiff." The question then to be determined, is simply this: Were the nine persons who voted at the last election, at that time the nine capital bailiffs of this borough of Milbourne Port? If they were, they had a right to vote under the determination of the House in the year 1796. To prove that they were, we produce these several appointments in the year 1818; precisely similar to and substantially the same with, the appointments of preceding years, which have also been given in evidence, and by virtue of which, as appears from the evidence, the capital bailiffs named in those appointments actually voted in the elections of those years, and no objection was taken to the votes.

Various documents have been referred to by the petitioners, to prove that tenants *in capite* have a right to vote. But will this prove that none but tenants *in capite* have a right to vote? That, indeed, would prove too much for the petitioners; for they have themselves superadded inhabitants paying scot and lot. The sitting members, however, rest on that which has been the established practice for years; and who is there that does not know, that against the strongest title which can be made to every species of property, except church property, sixty years possession is good?

With respect to the document which has come from the commonalty chest, its state is such, that it ought not to be received in evidence. Besides, it must be admitted, that no ancient document like this can be evidence of a fact, unless acts are proved to have been done confirmatory of that fact. But if received, what will it prove? Merely that there are nine men of a better description in the town, called lords, who, when they are absent, may appoint deputies to do that which, if present, they might have done themselves. It proves neither what was the property, nor what was the custom in the borough.

As to the returns which have been produced in evidence, they tend merely to perplex the case. Could it have been shewn that any of the persons, parties to those returns, were seised of the specific bailiwick lands, that might have been material, but that cannot be shewn. The evidence of Mr. Batson tends to shew the contrary; that there are, somewhere in the borough, lands once distinguished as bailiwick lands, must be admitted; but where they are, and what are their boundaries, has long baffled all inquiries, and must remain a matter of uncertainty. Neither does the rota assist us in the inquiry; it merely shews us under what designation the lands have passed in the borough, without insinuating that a seisin of those lands is necessary to confer a right to vote.

Then, with respect to these appointments, which give rise to the material objection, it is said, they differ materially from the appointments of former years, which have been read in evidence, by reason of the omission of the word lands. We contend, however, that these appointments are in substance and effect the same as those of 1745, and those of 1796. In ours, it is true, the word *lands* does not occur, but the bailiwicks are described by the names of the tenements, as Mullins, Sanders, &c. Do we not know, that the description

of lands by the name of the estate is sufficient? Is it not the ordinary mode in which persons properties are rated in a poor's rate? It is surely trifling to say, that, while in the year 1796, an appointment "*in respect of Hermans lands*" was good, the mere omission of the word "*lands*," in the appointment of 1818, vitiates the whole, particularly when in the rota itself, on which the petitioners rely, that word does not occur. But it is objected, that these capital bailiffs have a right to vote, only in respect of lands of which they are actually seised. This is an assertion without proof. They vote in respect of an office concerning lands, which lands are in the borough of Milbourne Port, though their precise situation cannot now be ascertained. But we are told, they are officers without an office, bailiffs without a bailiwick. The evidence, however, has informed us to the contrary. Nor are these precedings of a nature quite so anomalous or unprecedented as has been alleged. We know, that in many instances, offices have conferred this species of right. We know, from the authority of Gordon, that in the reign of Henry the Eighth, the Packington family actually returned members to serve in parliament, by an instrument under their own hand. The question now is, Are all these constituted authorities of Milbourne Port to be swept away, because the precise situation of the lands, in respect of which the offices are claimed, cannot now be ascertained? If so, why has not an application been made to the Court of K. B. for a *quo warranto*? It is well known, none such could be made with success.

The objection on the ground of occasionality does not apply to the present case. We know that formerly a man might vote in respect of a freehold, at whatever period the same might have come to him. But then came the stat. 26 Geo. III, (1) on which alone the objection of occasionality could arise. These persons,

(1) 26 Geo. 3, c. 100.

however, vote in right of offices to which they have been appointed, and therefore claim the benefit of the provisoes in those acts (1), excluding from the operation of those acts persons who have obtained their right to vote by promotion to an office. It is true the instruments were delivered back shortly after the election, but the offices still remain. The instruments are instruments under seal, and could not by this re-delivery be vacated. Besides, to reject these votes on the ground of occasionality, would be to determine differently from the committees of 1775 and 1796, before whom the very same objections were taken, and by whom the same were overruled. Upon the whole then, considering that the committee of 1796, if it had conceived that actual seisin and possession of the lands was necessary to constitute a capital bailiff, and confer on him the right to vote, would have so reported to the House, and that they have not so reported; considering also that these appointments have been made in conformity with that which has been the established usage in the borough during so long a period; the result is, that these nine persons were, at the time of the election, the nine capital bailiffs; that they had a legal right to vote, in virtue of the appointments by which the office was conferred, although they were not in possession of the lands, in respect of which their bailiwicks were constituted. The return, therefore, of the sitting members is a just return, so far as the votes of these persons are concerned.

(1) 26 Geo. 3. c. 100.

Reply.

Reply. The questions now before the committee were not decided either in 1774 or in 1796. Before those committees, it appears to have been taken for granted, that the appointments were good appointments, nor was it the interest of either of the contending parties to raise the question of illegality, for they divided the illegal votes between them. Neither in the report in Douglas,

nor in the minutes of evidence then taken, is there the slightest allusion to the question of occasionality; nor has our argument been shaken, that in the present case, nothing but an abstract right of voting is attempted to be conveyed by these grants. The evidence produced on the part of the petitioners, was not produced for the purpose of disputing the right of the inhabitants paying scot and lot; but it proves to this extent, that the persons entitled to vote under the description of capital bailiffs, were formerly tenants in demesne, holding lands of the crown; and that the right of voting was a territorial right, a right in respect of the lands which they so held. No attempt has been made to deny this. Admitting that the document from the commonalty chest can be evidence of reputation only, unless confirmed, still it is confirmed by all the other evidence. It is said, that we have shewn no instance in which a capital bailiff was in possession of the lands. By the returns which we have produced, and by the entries which we have read from the Journals, we have shewn, that in the years 1717 and 1747, Mr. Medlycott had some of these lands, (which was admitted by the counsel for the sitting members,) and that he had a right to vote, because he had these lands. We have proved then, by positive and distinct evidence, that the right of voting belonging to the capital bailiffs, arises out of the lands on account of which the fee-farm rent is payable, and depends on the possession of the lands. The legal origin of a different right of voting cannot be shewn. Ancient usage, immemorial custom, or prescription, might indeed prevail in establishing such a different right; but it is not by resorting to the year 1745, that usage, custom, or prescription can be proved. The appointment of 1745 was an innovation; all the subsequent appointments are innovations on the ancient constitution of the borough.

Of what description of bailiffs then are those who

have voted under this denomination? There is no description which they resemble; there is nothing like them in the law; they have no office, nor the most distant character of office. It is said, that the mere omission of the word "lands," does not distinguish the appointments of 1818 from those of 1774. Were it indeed a conveyance of actual property to the bailiffs, that word might be immaterial. The property, and together with the property the right of voting, might be conveyed as well by the description of "*Carrents*," as by that of "*Carrents Lands*." The insertion, however, of this word in former instruments, proves that the office of bailiff, and consequently the right of voting, was then considered as an office dependent upon and connected with the lands, while the omission of that word in the appointments now under consideration, evinces a disposition to disunite the office from the lands, and attach the right of voting rather to the office than to the estate.

These appointments amount merely to an attempt by a peer of Parliament to vote by deputy for a member of the House of Commons. Admitting that a peer of Parliament may, by virtue of his property, confer a right of voting; if he has a burgage tenure he may give it, if he has a freehold he may convey it, yet it is impossible to contend that the Marquis of Anglesea can, by nine such instruments as these, passing nothing but a bare right of voting, appoint nine deputies to do that which, as a peer of Parliament, he could not do himself.

Resolution. The committee resolved, That the votes of the nine persons thus objected to, ought to remain upon the poll.

George Longman's vote. Inhabitancy. The next objection which was argued, was an objection by the petitioners, to the vote given by one George Longman, on the ground that he was not, at the time of his giving his vote at the said election, resident within the said borough, and was consequently precluded

from voting, by the operation of the statute (1). It was admitted by the counsel for the sitting members, that George Longman had not been personally resident in the borough six calendar months previous to the day of the election; but it appeared from the evidence of his mother, that upon the death of his father, (who died intestate) which took place more than six months prior to the election, letters of administration of his goods and chattels had been granted to him, George Longman, by virtue of which, he had become legally entitled to certain leasehold property of his late father, situate in the borough, but had permitted his mother to continue to reside in it up to the time of the election; and it was argued by the counsel for the sitting members, that, as such administrator, George Longman came within the spirit and principle of the proviso contained in the last-mentioned statute; that the object of that proviso was to make a distinction between a possession cast upon a party by act and operation of law, and a possession coming to him fraudulently, or by his own act; and although an administrator cannot, strictly speaking, be said to take by descent or devise, yet he is the person who has the legal ownership and possession of the leasehold and personal property of the intestate, cast upon him by operation of law, with the same rights and interests as if the intestate had made a will of personal property, and appointed him executor; a case which it was urged would have come within both the words and the spirit of the statute.

(1) Stat. 26 Geo. 3, c. 100.

Argument for sitting member.

By the counsel for the petitioners it was argued, that to constitute an inhabitancy for the purpose of voting, there must be a personal residence and inhabitancy during six months prescribed by the act, which in the present case there had not been. That the exception contained in the statute, though it releases a party from the consequence of want of inhabitancy for the period of six months, cannot operate to make a man an inhabitant

Argument for petitioner.

who would not otherwise be an inhabitant, or even if it could, the present case could not be brought within the exception; for an administrator takes no property in analogy to one coming in by devise or descent; he takes merely an interest which is granted to a next of kin, or a creditor, or other person entitled to take out administration; and that for the benefit of others, who are entitled to the property as well as himself. In the present case, the mother was entitled to the property equally with her son; she continued to reside upon it; and her residence must be considered to have been in her own right, or if she resided on the property by permission of her son, that would not give him a vote; for a man cannot be an inhabitant by proxy.

Resolution. The committee resolved, that the vote of George Longman be rejected.

Andrew Brett's vote. The only other important points which were argued, arose upon the vote of Andrew Brett, who was objected to as not being "*an inhabitant householder* of the said borough at the time of the said election."

Inhabitants. By the last resolution of the House of Commons, in the year 1796, already alluded to, the right of election was determined to be in (amongst other persons) "*the inhabitants paying scot and lot,*" and the present objection turned upon the construction to be put on that resolution.

Argument for sitting members. In the first place it was contended by the counsel for the sitting members, that the petitioners ought not to be permitted to go into this objection, or give evidence that Andrew Brett was not an *inhabitant householder*. They contended that, under the terms of the resolution of 1796, it was not necessary that he should be an *inhabitant householder*, it was sufficient if he were an *inhabitant paying scot and lot*. That this resolution of the House of Commons was conclusive and final, and that no evidence could now be received to contradict it.

Argument for petitioners. On the part of the petitioners, it was argued, that

"inhabitant" being a word of uncertain and dubious meaning, they were at liberty to adduce evidence to prove what has been considered the meaning of the word "inhabitant" in the borough of Milbourne Port, since the House of Commons first adopted that term in the year 1702; and to shew (as they contended the fact was) that from that time down to the present, it has been understood, that "*inhabitant householders*" are the persons intended to vote.

Resolution.

The committee resolved, that the petitioners be not at liberty to go into evidence, to show that Andrew Brett was not an *inhabitant householder* of the said borough at the time of the said election.

2d. Objection lists.

It was next contended, on the part of the sitting members, that the petitioners having, in their list of objections, stated their objection to the vote of Andrew Brett to be, that he was not an "*inhabitant householder*," were precluded by the statute 53 Geo. III, c. 71, s. 1 and 2, from entering into proof that he was not an "*inhabitant.*"

Resolution.

The committee resolved, that the petitioners be permitted to go into evidence, to prove that Andrew Brett was not an "*inhabitant*" of the said borough at the time of the said election.

Evidence of inhabitancy.

From the evidence it appeared, that Andrew Brett was a farmer, and kept a mill; that his farm was situate at Oborne, two miles from Milbourne Port, where he had a farm-house, in which he generally resided and slept; that his mill was situate at Milbourne Wick, a mile and a half from the town of Milbourne Port, but within the borough; and had also a house attached to it, which was occupied by Mr. Brett's daughter-in-law (who had no concern with the management of the mill), and also by a servant employed and paid by Mr. Brett to look after the mill. In this house was a spare bedroom appropriated to the use of Mr. Brett, when he chose to sleep there; and in his absence to the use of

visitors. It also appeared, that Mr. Brett attended at the mill almost every day to look after the business, that he occasionally slept there, and that on the death of his son-in-law, he slept there during a whole month. But during the six months previous to the election he slept there only four nights; three in the month of March, while his servant was absent at the assizes, the fourth on the night before the election.

Resolution. The committee determined, that the vote of Andrew Brett be admitted.

Resolution. The committee determined, that the sitting members were duly elected, and that the petition was not frivolous or vexatious.

CASE XVII.

THE CITY OF ROCHESTER, IN THE COUNTY OF KENT.

The Committee was chosen on Friday the 11th of March, and consisted of the following Members:

Sir John Geers Cotterell, Bart. (*Chairman.*)
Sir William Earle Welby, Bart.
Lord Viscount Normanby.
Earl of Rocksavage.
Hon. William Elliot.
Lord Frederick Montagu.
William Chute, Esq.
Samuel Homfray, Esq.
Alexander Glynn Campbell, Esq.
John Pollexfen Bastard, Esq.
Hon. Peregrine Cust.
William Shepherd Kynnersley, Esq.
Thomas Sherlock Gooch, Esq.
Ralph Bernal, Esq. for the Petitioner. } Nominees.
Right Hon. Wm. Sturges Bourne, for the Sitting Member. } Nominees.

Petitioner: Robert Torrens, Esq.

Sitting Member petitioned against: Lord Binning.

Counsel for the Petitioner: Mr. Warren, and Mr. Harrison.
for the Sitting Member, Mr. Serj. Bosanquet, and Mr. Rose.

THE Petition stated, that at the last election of members to serve in Parliament for the city of *Rochester*, the Right honourable Thomas Hamilton, commonly called Lord Binning, James Burnett, Esq. and the Petitioner, were candidates. Petition.

That at the time of the said election, the qualification of Lord Binning was duly requested by the petitioner and other persons having a right to vote at that election;

and that Lord Binning was therefore requested by the same persons to take the oath prescribed by the 9th of Anne, as to his qualification; when Lord Binning insisted, that the provisions of that act did not extend to him, as he was the eldest son and heir apparent of a peer: and that being then asked whether he had any other qualification, declared that he had not, and refused to take the oath in compliance of the request so made.

That Lord Binning, as the son of the Earl of Haddington, a Scotch peer, was not within the exception relied upon by him at the said election, but was bound to state and swear to a due qualification in land: and that Lord Binning not being at that time possessed of any such estate as would qualify him to serve as member for the city of Rochester, must be deemed ineligible:— that the return of the said Lord Binning was therefore null and void.

Admissions. On the part of the petitioner it was admitted, that "Lord Binning was the eldest son and heir apparent of Charles Earl of Haddington, who succeeded by inheritance to the honor and dignity of the earldom of Haddington, in the kingdom of Scotland, which was held and enjoyed by his ancestors before and at the time of the union of the two kingdoms of England and Scotland."

By Lord Binning it was admitted, "that at the last election for the city of Rochester, the persons named in the petition were candidates; and also that he, Lord Binning, was duly requested at such election, by Robert Torrens, Esq. one of the candidates, and also by other persons having a right to vote at such election, to produce and swear to such a qualification as is required by the 9th of Anne; and that on such request being made, he insisted that the provisions of that act did not extend to him, he being the eldest son and heir apparent of a peer; and that being asked whether he had any other qualifi-

cation, he declared he had not; and then and there refused, upon such request, to take such oath."

Mr. Whittam, the Clerk of the Journals of the House of Commons, was called; who produced, from his office, a list of the qualifications of those members who sat in the parliaments of 1802 and 1812, from which the qualification on which Lord Kirkwall represented the borough of Denbigh was read. Evidence.

No other evidence was given on the part of the petitioner, and no evidence was adduced on behalf of the sitting member.

For the petitioner, it was argued as follows:—

The question in this case is, whether Lord Binning, *as* the eldest son of the Earl of Haddington, is qualified to represent an English borough in parliament? And it is contended, that this question must not be considered as at all dependant upon any of the privileges of the Scotch peerage, as identified with that of England by the union of the two countries, nor as decided by what may hitherto have been the practice, unconfirmed either by investigation or the decision of a committee. Instances, however, may be adduced, in which persons in a similar situation to Lord Binning have sat without, and also where they have thought it necessary to rely upon, a landed qualification. Argument for the petitioner.

This question depends upon the construction that is to be given to the 9th of Anne (1). To arrive at a just interpretation, it will be necessary to consider the relative situation in which England and Scotland stand to each other. With respect to the representation of the two countries, there never was, nor is there at the present moment, the slightest reciprocity whatsoever. Property in Scotland affords (2) no qualification in England; neither does land in England confer any qualification for Scotland. The qualifications required in the two countries, of their representatives, always have (1) c. 5.

(2) *Vide* Leominster case, *ante*, 1.

been, and still* continue separate and distinct. The qualification required in Scotland, both prior and subsequent to the Union, has remained the same: there a candidate must be qualified to elect before he is capable of being elected. The qualification required of members of parliament in England, is regulated by the statute of the 9th of Anne; and the operation of that act is expressly confined to England, Wales, and the town of Berwick upon Tweed. The policy of that act was to increase the influence of the landed interest. No person is qualified, under that act, to sit in parliament, who is not in possession of a certain estate in land in England, Wales, or the town of Berwick upon Tweed, excepting the eldest son and heir apparent of any peer or lord of parliament, or of any person qualified to serve as knight of a shire. It was neither the object nor the intention of that act to confer any personal qualifications independent of or unconnected with the possession of landed property; for the exception in favour of the eldest sons of peers must be taken with the concomitant exception in favour of the eldest sons of persons qualified to serve as knights of a shire, and then it will be seen, that it was not the possession of a seat in the legislature that was looked to to confer the qualification, but the presumption that was raised of the interest in and ultimate possession of landed property. But if it is sought to extend this exception to the eldest sons of Scotch peers, this presumption falls to the ground; for neither the reversionary expectancy, any more than the actual possession of the largest estate in that country, is capable of conferring a qualification for the representation of an English borough. In this view

* Landed property in Scotland is now, by the 59 G. III, c. 37, placed upon the same footing, as far as respects the qualification of members of parliament, as that situate in England and Wales.

of the subject, therefore, it would be immaterial whether the peer of Scotland, whose son Lord Binning is, was or was not a representative peer, because it is contended that this question is not to be decided upon any distinction that may be attempted to be taken between a *peer* or a *lord of parliament*, but that it rests upon the broad and general objection which has been taken in the construction now given to the 9th of Anne, namely, that Lord Binning, as the eldest son of a peer of Scotland, is not a person within the operation of the exception contained in that act in favour of the eldest sons of peers or lords of parliament. But if the committee should not be of opinion that the construction which has been put upon the spirit, object and intention of the 9th of Anne, is correct, still another objection arises to the qualification claimed by Lord Binning, from the wording of the excepting clause. The words of exception are, "eldest son or heir apparent of any peer or lord of parliament." A question therefore arises, whether the eldest son of a Scotch peer, who is not a lord of parliament, (which is the case of Lord Binning on the present occasion,) comes within the meaning of these words? It probably will be urged on the other side, that the words "*peer or lord of parliament*," are to be taken in the disjunctive; but such cannot be the sound construction of the clause. "*Peer or lord of parliament*," is a parliamentary phrase of frequent occurrence in acts of parliament (1), previous to and about the date of the statute under consideration; and these used to designate one and the same class of persons. It is not a term introduced into this act, which passed immediately after the union of this country with Scotland, for the sake of including that part of the Scotch peerage, who were not lords of parliament, in its excepting clause, but one frequently used, with application to the peerage of England alone. That "*or*" may be used in a conjunctive sense, is not peculiar to acts of parliament; our best

(1) 30 Car. II, stat. 2, c. 1. 12 & 13 W. III, c. 3. 2 & 3 Anne, c. 18.

writers in prose and verse have frequently so employed it. Therefore if the committee should be of opinion that the eldest son of a representative peer of Scotland can be considered as included in the exception contained in 9th Anne, still an objection to Lord Binning's qualification remains, which is equally fatal.

The question, consequently, rests upon the construction which is to be given to the statute of the 9th of Anne, by which test the qualifications of all persons who may now be desirous of a seat in parliament must be tried; and unless a person either possesses the qualification in land thereby required, or comes clearly within some of the exceptions therein contained, he is not qualified to sit in parliament. It is therefore contended, that Lord Binning, as the eldest son and heir apparent of the Earl of Haddington, is not an eldest son and heir apparent of *such a peer* as comes within either the contemplation or enactments of the 9th of Anne; and that as Lord Binning declined to give in and swear to such qualification in land, as is required by that statute, when requested so to do at the election, he must be deemed by the committee not to have been duly qualified at the time of his election; and that his want of qualification was, by such refusal, made notorious; and that consequently the election of Lord Binning is not ony void, but the petitioner* is entitled to the seat.

Argument for sitting member.

For the sitting member it was contended, that the spirit, object and intention of the 9th of Anne, was not such as had been stated in the argument on behalf of the petitioner, but that it was the aggrandisement and influence of the aristocracy, not of the landed interest

* This point was argued at considerable length on both sides; but as it was unnecessary for the committee to come to any decision upon the claim made by the petitioner to the seat, and as the arguments on similar points have already been given in the cases of *Leominster* and *Penryn*, it has not been thought necessary to do more than shew that the seat was claimed by the petitioner.

alone, which that statute had in view; and that it was for this object that the legislature required either the possession or reversionary interest of landed property, or of what was equally to the purpose, high hereditary rank or distinguished office. That such was the object of, and would be found to be consistent with, the provisions contained in the statute of Anne. This case has been argued upon a distinction that has been taken between the peerage of Scotland and that of England: it has also been contended, that the word "*or*," as used in the statute of Anne, must be taken in the conjunctive, and construed "*and*;" but neither of these positions will bear the test of accurate examination, or be found to be consistent either with the temper or history of the times, the object or spirit of the act, or the situation of the parties concluded by it. Since the union with Scotland, properly speaking there have been neither Scotch nor English peers, all are peers of Great Britain. By the articles of Union, the rights and privileges of the two countries were for the most part interchanged, and where any difference was allowed to remain, that distinction was carefully and accurately marked out. Nothing, perhaps, was more maturely weighed and carefully considered than the privileges that were to be retained or given up by the Scotch peerage: that body was called upon to make considerable and greater sacrifices than any other body of men; their numbers relatively to the English peers were then so great, that it was necessary they should in some measure part with their share in the legislature; but at the same time that they relinquished, as a body, their claim to a seat in the House of Lords, and only exercised their rights as hereditary counsellors of the crown, in the persons of their sixteen representatives, they most carefully retained and stipulated to participate in all and every the privileges and immunities belonging to the peers of England, ex-

cepting only their seat in the House of Lords, and the privileges attendant thereon (1). They remained, with that one and sole exception, peers of the realm, with all the attendant privileges; all capable to elect; all qualified to sit and act as members of the House of Lords. Reference has been made to the language of acts of parliament passed in the reigns of Car. II, Wm. III, and of Anne, as illustrative of and controlling the meaning of the words "*peer or lord of parliament*," as used in the 9th of Anne. That test is not objected to, because it will be seen, that in each of those acts, those words must have been used in the disjunctive, and as applicable to two distinct classes of persons. If this argument, which has been used in behalf of the petitioner, be correct, it must be shewn that none are lords of parliament who are not peers, as well as that none can be peers who are not lords of parliament; but such a proposition would be totally incorrect, because many persons are peers who are not lords of parliament, and lords of parliament who are not peers. The bishops are lords of parliament, but not peers. Peeresses, in their own right, have all the privileges of peers, and they cannot be lords of parliament. Roman-catholic peers are not the less peers, although they do not profess the protestant creed, and yet they cannot become lords of parliament, unless they take the oath prescribed by the very act of Car. II, to which allusion has been made as governing the language of the 9th of Anne. Minors too are peers, but who will say that they are lords of parliament? It therefore appears clearly, upon examination, that the words "*peer or lord of parliament*," cannot be synonymous, because there are, and always have been, many persons, both Scotch and English, who are one without being the other. Then what has been the practice? Have the eldest sons of peeresses, or of catholic lords, or of bishops, been considered as comprehended within the

(1) 5 Anne, c. 8. 23 art.

exception in favour of the eldest sons of peers or lords of parliament, or have they not? If they had been obliged to rely on a landed qualification, would not that have been shewn? That, however, is impossible, because the practice has been quite otherwise. What also has been the practice with respect to the eldest sons of Scotch peers? One* solitary instance (namely, that of Lord Kirkwall, the eldest son of the Countess of Orkney,) alone has been given in evidence, in which a landed qualification has been relied on: if the contrary had been the case, it easily could and would have been proved before the committee. Neither can it be contended with success, that the exemption depends upon the possession of a seat in the legislature, because it is not the eldest sons of knights, but of persons "*qualified*" to be knights of shires, who are eligible, without possessing any qualification in land. This examination then of the statute of Anne, the history of the times, the object and feelings of the parties, but, above all, of what then were and still continue to be the component parts of the House of Lords, and the peerage of this kingdom, shew, that the words "*peer or lord of parliament*," as used in the 9th of Anne, must have been and were adopted for the express purpose of including not only those who actually were, but those who were of sufficient rank to be lords of parliament, not with reference to Scotland or the Union alone, but with reference also to a large body who long had been a component part of the House of Lords and the peerage of England: consistent also with the construction that has been given of the spirit, object and intention of the 9th of Anne, namely, that of increasing the power

* Between 1759 and 1818, there are fourteen instances in which the eldest sons of Scotch peers have been elected, who have not signed the qualification roll but in 1812, Lord Kirkwall, the eldest son of Lady Orkney, signed for lands at Taplow, in the county of Bucks.

of the aristocracy, inasmuch as these words of exception include not only an exception in favour of landed property, but also of exalted rank and high office. It has been argued, that if it had been the intention of the legislature to have included the eldest sons of Scotch peers, that they would have been mentioned in express terms. To this it is answered, that the words used are apt and sufficient to do so. The limited construction that the exception applies only to the sons of the sixteen representative peers is self-destructive, because from the formalities to be observed, and the notices which it is necessary to give previous to their election, it is absolutely impossible that any person would be qualified as such, in time, to benefit by such exception at any general election.

It is therefore contended, with confidence, that the exception in the statute of Anne does apply to peers who are not lords of parliament, as well as to lords of parliament who are not peers.

It is admitted, that Lord Binning is the eldest son and heir apparent of the Earl of Haddington, whose peerage is not denied; and that being the case, we contend, that both within the spirit, meaning, object and letter of the 9th of Anne, *as the eldest son and heir apparent* of the Earl of Haddington, he was duly qualified to be returned as member for the borough of Rochester, at the last election.

Resolution. The committee resolved,

"That Lord Binning was duly elected."

"That the Petition was frivolous and vexatious."

CASE XVIII.

THE BOROUGH OF CAMELFORD, IN THE COUNTY OF CORNWALL.

The Committee was chosen on Tuesday the 8th of June, and consisted of the following Members:

William Gore Langton, Esq. (*Chairman.*)
George Sinclair, Esq.
Daniel Whittle Harvey, Esq.
Edmond Woodhouse, Esq.
Thomas Dundas, Esq.
John Hearle Tremayne, Esq.
Samuel Jones Loyd, Esq.
Joseph Hume, Esq.
George Byng, Esq.
Thomas Mackenzie, Esq.
Sir Scrope Bernard Morland, Bart.
William Miller, Esq.
Lord Charles Somerset Manners.
James Macdonald, Esq. for the Petitioners.
John Singleton Copley, Esq. for the Sitting Members.

Nominees.

Petitioners: Electors.
Sitting Members: Mr. Stewart and Mr. Allsopp.
Counsel for the Petitioners: Mr. Warren, Dr. Lushington, and Mr. E. Alderson.
for the Sitting Members: Mr. Serj. Pell, Mr. Harrison, and Mr. Courthope.

THE Petition stated, that for some time previous to the general election in June last, of members to serve in this present Parliament for the borough of *Camelford*, in the county of Cornwall, John Stewart, Esq. Lewis Allsopp, Esq. Thomas Hanmer, Esq. ——— Polhill, Esq. Mark Milbank, Esq. and John Bushby Maitland, Esq. were candidates, and canvassed the electors of the said borough by themselves, their agents, friends and parti- Petition.

Special report.

Mr. Manning, the chairman, also acquainted the House, that the select committee had come to the following resolution:

Resolved, "That the committee feel it their duty further to report to the House, that it appears to them, that practices the most corrupt have existed in the borough of Camelford; but that the distinct acts of bribery are not sufficiently established by evidence to justify them in asking the interference of the House."

This short notice of the former case is introduced on account of the connection it has with the proceedings upon the present petition, and is thought sufficient as respects the points then brought under the consideration of that committee, which with the exception of *Rosevear's* case, were merely issues of fact, not involving the discussion of any questions of law.

Right of election at Camelford.

The right of election at Camelford is declared to be in the freemen and inhabitants paying scot and lot.

The counsel for the petitioners in his opening speech, stated, that the acts complained of in this petition, took place previously to the first election, when several voters of Camelford had a meeting at the Allworthy inn, near that town; in consequence of which a conspiracy took place between the freemen who attended that meeting, Mr. Hallett, who resided in London, and Mr. Stewart and Mr. Allsopp, to procure the return of those gentlemen for that borough, in consideration of the payment of 6,000 *l.* to be divided amongst the fifteen electors who formed the majority at Camelford, affording a dividend of 400 *l.* to each elector. And that the petitioners now contended, that they were at liberty not only to shew that Mr. Stewart and Mr. Allsopp were parties to that corrupt agreement, but also that they obtained their return at the last election in consequence of it; and that evidence of what then took place was admissible on two grounds, 1st, as being a case of conspi-

racy, the acts of one are to be considered as the acts of all; and 2dly, that in the eye of the law, a promise to pay is as much bribery as the actual payment of a sum of money.

It appeared by the evidence, that at the last election Mr. Stewart was a candidate; and although Mr. Allsopp was not at that time put in nomination, yet he went down to Camelford with the same intentions as Mr. Stewart, and on the same interest, though he did not, in point of fact, become a candidate at that time, because there were four candidates on the same interest; in consequence of which, they cast lots who should stand, when the lot fell on Mr. Stewart and Mr. Hanmer, who was since dead, and that those two gentlemen accordingly stood in opposition to Mr. Milbank and Mr. Maitland, in whose favour the return was made. Evidence.

A witness of the name of John Brown stated, that he was a freeman of Camelford, and that on or about the 17th of May 1818, about five weeks prior to the first election, he was at a meeting which took place at the Allworthy inn, five miles from Camelford, at which Edmund Harvey, Richard Gayer, jun. John Rosevear, John Harvey, Joseph Rounseval, and the Rev. Mr. Mason were present:—That they conversed about the approaching election, and that Mason said, he could bring forward two men who would satisfy them:—That it was observed, that 6,000*l.* must be deposited to be divided amongst the voters, which Mason refused to do:—That a letter was produced from James Harvey, who was then in London, to Edmund Harvey, containing an offer of the money:—That another meeting was held at Five Lanes, at which Gayer, Harvey, Rowe and Rounseval were present; when it was agreed, that Gayer should write to James Harvey, accepting the terms offered in his letter; and that Edmund Harvey said, his father

(John Harvey) would go over to Lord Darlington if the letter was not written:—That as they were going from Camelford to Five Lanes, it was said the terms were 6,000 *l.* and must be accepted:—That he recollected Mr. Stewart arriving at Camelford with Mr. Amory and Sibley on the Saturday before the election, when he was canvassed by Mr. Stewart for himself, and by Mr. Amory for Mr. Allsopp:—That James Harvey was there, and told him, they were the gentlemen he had got to come down:—That Gayer and Edmund Harvey said, they were *our* gentlemen; and that he was canvassed by Mr. Amory for Mr. Stewart and Mr. Allsopp previous to the last election.

John Rosevear, also a voter at Camelford, remembered being at the Allworthy inn previous to the election in 1818, when Mason, Rounseval, Gayer, the two Harveys and Brown were there:—That Mason said, there were two men coming down, who would behave handsomely:—That Rounseval had mentioned to him before the election, that there were 6,000 *l.* lodged, and that the voters would have 400 *l.* apiece; and took him into an adjoining room, where he wrote the figures 200 *l.* on the floor-stone, and offered him that sum in addition to the 400 *l.* to go out of the way with Brown on the morning of the election:—That on the morning of the election, Rounseval again called to persuade him to do so, when he said he had promised Maitland and Milbank:—That Rounseval then said, that all was over. The witness also stated, that he had a conversation with Gayer before the election, who said, that 6,000 *l.* were lodged, and that they were to have 400 *l.* each:—That this party had frequent meetings about this time, at Mason's, Arthur Jewel's, Pope's, Bond's and Harvey's:—That Gayer said they were forming a party. This party was called the "*Bundle of Sticks.*"

John Sibley proved, that he was a partner with

Mr. Hallett, and was at his house early in June 1818, when Hallett shewed him six or seven bank bills for 1,000 *l.* each, and asked him if he thought the Camelford people would bite at that:—That Hallett said, he could cut them in two and send them to Mr. Ching at Launceston:—That James Harvey was frequently at Hallett's about that time:—That Hallett told him he was going into Cornwall, and asked him if he would go also; to which he consented, and went down in the same carriage with Hallett, Mr. Stewart and Mr. Amory:—That on the night before they reached Camelford, they slept at Eckley's house at Launceston:—That Mr. Stewart, Mr. Amory and Hallett canvassed together:—That Hallett introduced them. Saw Gayer, Harvey, Bond and Rounseval often at Camelford:—That after the election, he saw Hallett again at his manufactory in London, when he said the Camelford voters were a set of scoundrels; that he had sent Gayer's brother for the money which he brought back in a letter, and then disappeared with it, and that he could not find him till he came to an understanding with the freemen.

Thomas Ching stated, that he was a druggist at Launceston, and had formerly been connected in trade with Hallett:—That he received a letter from Hallett about the 8th of June 1818, which contained the halves of six bank bills for 1,000 *l.* each, which he had in his possession five or six days, and afterwards sent them by Samuel Gayer to Hallett at Camelford:—That he saw Hallett whilst he had the notes, and asked him if he would have them; when he said no, but that if he wanted them he would send for them:—That he received the following letters * from Hallett:

* These letters were read from copies taken by Mr. Darke. Considerable objection was made to the production of the copies; but it is unnecessary to state the evidence given, either in support of their authenticity, or to shew the destruction of the original letters.

"My dear Sir, London, June 10, 1818.

"Pray take care of the inclosed till you see me: desire Eckley to have four horses (no chaise) reserved for me to go to Camelford; I start very early to-morrow; I shall reach Launceston to sleep on Friday night, if no impediments happen. Be secret.—Your's truly,

"*W. Hallett.*"

"My dear Sir, Camelford, June 13, 1818.

"Pray send by first conveyance a box of best raisins, sufficient quantity of almonds, some French plums, and oranges if good; send also one dozen lemons, half a dozen olives (quarts), together with anything you may think would be to us acceptable. We find every thing as we expected; and I trust shall by and by have the pleasure to say we are successful. I do not like to be too sanguine.—Your's truly, "*W. Hallett.*"

"We did well to get here in time; we have possession of the best apartments. Six candidates. Should we succeed, I shall have to request Mr. Eckley to send down sundries, and perhaps a cook."

"Dear Sir,

Pray send me the halves by bearer. We expect one and one; he can tell you.—Your's, in haste,

"*W. Hallett.*"

"I expect to send to Eckley for supplies to-morrow.

"Tuesday noon."

The witness also stated, that after Hallett's return to town, received another letter, in which he said, "being now returned, it is time I should see about settling my accounts: I will thank you to pay Eckley his account, and draw on me at thirty days for that and your own."

Samuel Gayer stated, that he was employed by Hallett during the election, to take a letter to Mr. Ching at Launceston, and that he brought back another letter, which he gave to Hallett the first time he saw him; at which time, the election was over:—That he saw the letter opened, and that it contained bank notes, or something that appeared like bank notes.

Edward Polhill, Esq. stated, that at the general election in 1818, he went down to Camelford with Mr. Hanmer, intending to become a candidate, but that in fact he did not stand:—That on account of the number of candidates, lots were put into a tea-pot and drawn to see who should stand:—That both Mr. Hanmer and himself were strangers to the other parties.

Thomas Bishop deposed, that he was a farmer residing near Camelford, and that in June 1818, he was applied to by Rowe, who told him, the party wished that he and Mr. Avery should hold 1,000*l.* or 1,500*l.* for the voters of Camelford, which he declined doing.

Edward Beale, a bookseller, residing in Tottenham-court-road, stated, that Rounseval and Rowe were at his house in February last, and Rounseval afterwards in March, during the hearing of the Camelford petition:—That Mr. Stewart called upon them there, and also Mr. Allsopp: and that he once heard Mr. Stewart say, they had dined with him:—That he went to Pollard's, in Stangate-street, on Good Friday, and saw Hallett there.

Edward Dinham proved, that he went to Pollard's, in Stangate-street, the night after the last petition was decided, to receive the expenses from Mr. James Harvey for a witness who had been summoned to attend the committee, when he saw Hallett, James Harvey and Gayer there; likewise most of the witnesses who had been attending before the committee.

Ephraim Lacy stated, that previous to last Easter he lived at Pollard's, in Stangate-street, who was brother-in-law to Hallett, and that he saw Hallett,

James, John, and Edmund Harvey, Rounseval, Pope, Bond, Gayer and Amory there frequently about that time: and that James Harvey paid the bill.

W. F. Pearce proved, that he was one of the poll-clerks at the last election for Camelford:—That Mr. Stewart was not present at the close of the poll, but that Mr. Allsopp was; on which occasion Mr. Allsopp returned thanks to the electors for himself and his colleague:—That Mr. Stewart and Mr. Allsopp had the same counsel and the same agents, and that those who voted for one voted also for the other.

A notice was delivered in, dated 17th April 1819, signed Amory and Coles, agents to John Stewart, Esq. and Lewis Allsopp, Esq. candidates for the representation of the said borough; and also a notice, dated 28th May 1819, signed Amory and Coles, agent to John Stewart, Esq. one of the sitting members.

It was admitted by the counsel for the sitting members, that Richard Gayer the younger, Joseph Rounseval, Edmund Harvey and William Rowe voted for Mr. Stewart and Mr. Allsopp.

Argument for the petitioners.

* Upon this evidence the counsel for the petitioners contended, that the evidence fully proved the conspiracy, and also that the sitting members had been parties to it. That by the resolution of the House of Commons in 1677, and also by the statute of William, the persons guilty of bribery and treating, were incapacitated from retaining their seats: and further, that by the 49 Geo. III. (1) any person giving any money, &c. or making any promises, &c. in order to be returned, or who has consented to or knows of any such gift or promise being made, is declared and enacted

(1) c. 118.

* A great deal of evidence was received to shew, that Mr. Hallett had absconded and kept out of the way, to avoid being summoned to give evidence before the committee; which it has not been thought necessary to notice at great length. *Vide* the last resolution of the committee.

to be disabled and incapacitated to serve *in that parliament* for any such county, &c. That when a vacancy once occurs, whether in consequence of a dissolution, the death of a former member, or of any such cause, the seat in the eye of the law still continues vacant, and the original writ in force till a valid and legal election has been made; and it matters not how many invalid elections may intervene; because the writs issuing in such cases are to be considered in the nature of an *alies* or *pluries* writ, referrible still to the original writ, which remains unsatisfied till a good and sufficient return has been made. That numerous cases (1) had occurred, in which it had been determined, that persons who have been guilty of bribery at a prior election are thereby rendered ineligible at a second. Hence, as soon after the writ issues, as any corrupt agreement is made, so soon does the incapacity to sit commence, which, when it once attaches, cannot afterwards be shaken off during the remainder of that parliament. That it therefore appeared, both from the law of parliament and of the land, that no one having been a candidate to fill up any vacancy, and having been guilty of bribery for that purpose, whether he has been returned or not, is eligible afterwards to supply that vacancy; and that if this were not the sound construction of the law, all the enactments against bribery would be futile, and would only enable a party to do that indirectly which the laws of this country forbid in the most positive manner to be done directly.

(1) 2d Southwark, *Clifford*; 2d Canterbury, ib.; Seaford, 3 Luders; Hindon, Worcester, Kirkcudbright, 1 Lud. 72.

Argument for the sitting members.

The counsel for the sitting members argued as follows:—The petition states, that at the first election for Camelford, Mr. Stewart and Mr. Allsopp, Mr. Hanmer and Mr. Polhill, and Mr. Maitland and Mr. Milbank were candidates, but that previous to the election, Mr. Allsopp withdrew. It therefore appears from the petition itself, that, in point of fact, Mr. Allsopp was not a candidate at that time. The petition then states, that

the sitting members were candidates at the last election; and then comes the charge of bribery, which is divisible into two distinct charges; one, as applicable to what took place previous to the first; the other, as to what was done at the second election. Now it is not contended, nor has any evidence been adduced to shew, that any thing in the least improper took place previous to the last election: if any thing improper took place, it was before the first election, and then only, at which time Mr. Allsopp was not even a candidate. Evidence, however, has been given to shew, that previous to the first election, a conspiracy, as it is called, was entered into, to procure a return by corrupt means for the borough of Camelford; but, however Hallett, Rounseval, Rowe, or any of the party who met at the Allworthy inn, may be considered as affected by any thing which then took place, no evidence has been given which connects the sitting members with it. The mere assertion of a conspirator, that *A. B.* is a co-conspirator, is not sufficient to prove him one, neither can his participation or assent be inferred upon suspicion or surmise only; some act of the person accused must be shewn, from which such assent and participation are to be proved; and in this case that has not been done in any one instance. It is also contended, that the 49th of Geo. III, has no reference to this case. That act was passed, with a view to punish third persons who might interfere in the work of corruption, not being either candidate or voter, as a check upon the proceedings of those persons who are called patrons of boroughs. If the acts with which the sitting members are charged amount to an offence, it was as criminal before as it could be subsequent to the passing of that statute. No case has been cited on the other side, in which a person who was candidate and petitioner only at an antecedent election, has had his return at a subsequent one avoided for bribery committed at the first election. In all the cases cited,

the party who was unseated, or who was declared to be ineligible, had been himself returned in the first instance, and that return had subsequently been set aside by a judgment of a committee, finding that he had been guilty of bribery or treating at such first election. But the present case is widely different. If the petitioners wished, they might and ought to have given the evidence which is now adduced on the trial of the former petition, when the conduct of Mr. Stewart was investigated; for they never can be suffered to lie in wait and split their case, bringing forward one half at one time and one at another, because it is a principle of the law of England, that a man shall not be brought into jeopardy twice for the same offence; and if evidence of what took place prior to one election, can be received when the merits of a second are inquired into, such inquiry may, on the same principle, be extended to a third or fourth. The evidence also which has been given in this case in support of the charge of bribery is perfectly novel; neither payment nor the promise to pay any sum of money to any one or more voters, has been proved, with the exception of what the two accomplices have stated to have been offered to themselves. The charge of bribery, therefore, amounts simply to this, that a person had been found who would and did send down 6,000 *l.* but in no one instance has it been shewn that any one has participated, or even received a promise to participate in the division of that sum, either before or after the first or second election. Mr. Stewart therefore remains unconnected with the acts of the party who met at the Allworthy inn previous to the first election, and his return consequently cannot be called in question on the present petition. Mr. Allsopp's case is still stronger, for he never was at Camelford till the second election; and although it is stated that Mr. Amory did canvass for him previous to the first election, yet it has not been shewn that he was either consenting to or

cognizant of that fact; and it is well known, that any person may not only be nominated, but even elected and compelled to serve, without his consent, and even against his will.

Report.

The committee resolved, That neither Mr. Stewart nor Mr. Allsopp were duly elected.

That neither the petition nor opposition were frivolous or vexatious.

Special report. Bribery.

Resolved,

That it appears to this committee, that at the last election for the borough of Camelford, in the county of Cornwall, the said John Stewart, Esq. acted in violation of the provisions of the statute of the 49th of his present Majesty, chapter 118, and is thereby incapacitated to serve in this present parliament for the said borough.

Resolved,

That it appears to this committee, that Joseph Rounseval, Edmund Harvey, Richard Gayer, jun. William Rowe and John Brown, electors for the borough of Camelford, and William Hallett, of Saint Mary Axe, in the city of London, druggist, and James Harvey, of Camelford, did corruptly endeavour to procure the return of two persons to serve in parliament for the said borough of Camelford.

Resolved,

That it appears to this committee, that William Hallett, of Saint Mary Axe, in the city of London, druggist, has wilfully absconded, in order to avoid being summoned to give evidence before this committee.

Incidental point. Sitting members not permitted to appear by separate counsel.

At the ballot, the sitting members did not apply to strike separately, but they proposed to appear by different counsel before the committee, on the ground that they were not equally implicated in the charges contained in the petition, one of which alleged, that bribery had been committed by them previous to the election in 1818, at which election Mr. Allsopp was not a candi-

date. It was admitted in argument, that this was a case for the discretion of the committee; however, the counsel for the petitioners objected to the request being granted, and contended, that both the sitting members were equally implicated in all the charges in the petition, and that although Mr. Allsopp did not stand a poll at the first election, yet that he was connected with the proceedings complained of, by having been a party to the previous canvass, and as appearing both there and at the last election by the same agent as Mr. Stewart.

The committee resolved, "That the sitting members be not permitted to appear by separate counsel."

Preliminary objection.

After the petitioners counsel had opened their case, the counsel for the sitting members objected that the petitioners were not entitled, under the allegations contained in the present petition, to proceed with the proof of the case they had opened. The substance of their arguments was as follows:—This petition does not lay any claim to the seat, consequently no evidence can be received to shew that particular voters were bribed; neither is any evidence admissible to affect the sitting members, except it be applicable to the general charge of bribery. In the petition, there is no allegation of any act of bribery having been committed previous to the election which took place in April last, therefore no notice has been given of any intention to inquire into the transactions of any former election. It is admitted, that a petition need not be drawn with the same precision and legal nicety of expression as is required to be used in an indictment; yet it has always been held necessary, that it should substantially and distinctly disclose the nature and grounds of complaint on which a party means to rely. The question also which is now proposed for the decision of the committee, is one which might have been inquired into on the trial of the former petition,

Argument for the sitting members.

and consequently is one which the committee will not entertain on the present occasion. If the petitioners abandon the charge of bribery on the trial of a petition, that does not preclude the sitting members from proceeding to give evidence of bribery to affect them by way of recrimination; and if it appears clearly on the minutes, that a party has been deemed by a committee to have been guilty of bribery, whether he has been returned, or whether he was merely a candidate, he is equally incapacitated, and his conduct equally subject to investigation. In what situation then do the sitting members stand on the present occasion? Mr. Allsopp was not even a candidate at the first election, and connected with Mr. Stewart in a preliminary canvass alone, which canvass he subsequently abandoned. Mr. Stewart, it is true, was the petitioner on the former occasion, but then he has stood his trial and been acquitted, and his conduct at the first election, if culpable, might then have been called in question. One of the sitting members, therefore, has already been acquitted, and the other is totally unconnected with the whole transaction. In all the cases on which the counsel for the petitioner relied in his opening speech, bribery had been distinctly proved before a committee on the trial of a former petition; they consequently cannot be cited as concluding authority in a case where no previous investigation has taken place, still less in one which has been investigated, and no charge of that nature has been made. Then it cannot be said, that they were not in possession of the evidence, which it is now attempted to produce, at the trial of the former petition, because the witnesses now intended to be called were then in attendance. Besides, it is a principle of the law of England, that a man shall not be tried twice for the same offence. Mr. Stewart has been tried and acquitted, and consequently cannot be called on again to answer, although recourse has been had to a

novel manœuvre to prove a charge, under the specious and comprehensive name of conspiracy, which has already totally failed under the simple designation of bribery.

Argument for the petitioners.

For the petitioners it was argued, that the petitioners were not precluded from going into evidence on the present case. With respect to the first objection, it was contended, that the language of the petition was sufficiently clear, because it stated, "that shortly previous to and after the issuing of the writ for the general election in June last, and at and during and before the said election which took place the said 17th day of April;" and that these words were sufficient to shew that the attention of the committee would be called, not only to the proceedings previous to and at the election of 1819, but also in like manner to that of 1818. In answer to the second objection, it was urged that no authorities had been cited to shake the cases relied on in the opening, but on the contrary, that a still stronger case existed than any that were mentioned on that occasion(1). Then it cannot be said, that Mr. Stewart has been tried and convicted, because it merely appears, that on the former occasion this case was not inquired into; and no case has been cited to shew that the then sitting members were bound to go into such evidence at that time. But independent of this, the parties are changed; and it never can be argued, that because the sitting members on a former petition did not inquire into a case which might have been proved at that time, that the petitioners are therefore precluded on the present occasion. To make good the proposition advanced on the other side, it must be shewn, not only that the sitting members were bound to recriminate at the trial of the former petition, but also that having declined to do so, that all the world are precluded ever after from entering on a charge of bribery, which might have been capable of proof at that time.

(1) Seaford, 3 Luders, 110.

Resolution.

The committee determined, "That the counsel do go

into evidence in support of the case opened on behalf of the petitioners."

Evidence. Acts of persons in the absence of the candidates and their agents.

The examination then proceeded, till the following question was put to John Brown. "At that meeting," (alluding to the meeting at the Allworthy inn), "did any thing take place with respect to the election that was about to ensue?"

This question was objected to by the counsel for the sitting members, on the ground that it was not proved that either of the sitting members or any of their agents were present, and that no evidence could be received to affect them that did not relate either to their own acts or to those of their agents. That it had been repeatedly decided, that evidence could not be received of the acts of alleged agents, until the agency was first proved; still less was evidence of the conversation of voters admissible to affect third parties who are charged with being conspirators, until it had been first shewn that they were such. That in the *Helstone* case, the letters of the peer, which were the foundation of those meetings at which the conspiracy took place, were produced. That the resolution in the *Ilchester* case did not apply, as it related to a case of agency and not of conspiracy.

Argument for the petitioners.

On behalf of the petitioners it was contended, that this was a case of conspiracy; that it had been opened as such; and consequently, that what was said or done by one conspirator, was evidence to affect any other conspirator. That this was not only the general law of the land as respecting conspiracies, but that the resolutions of the committees who sat both on the first and second *Ilchester* cases (1) were conclusive authorities to shew that the evidence now tendered ought to be received.

(1) 1 Luders, 470. 1 Peckwell, 303.

Resolution.

The committee decided that the question be put.

Rosevear's case.

The vote of John Rosevear was objected to, on the ground that he did not pay scot and lot.

On the part of the petitioners, the solicitor to a com-

mission of bankruptcy awarded against Rosevear was called, who produced the proceedings under the commission, by which it appeared that he was duly declared a bankrupt. The assignment was dated the 23d of August 1816, and it was stated in evidence, that the bankrupt had neither obtained his certificate nor paid a dividend, and also that his estate was not solvent.

In support of the vote, one of the overseers of Camelford was called, who proved, that he had been in office from March 1817 to March 1818; that he knew Rosevear, who lived in the same house for the last ten or twelve years; that he frequently received rates from him during the year he was in office, and that the last payment was made to him by Rosevear at his own house, on the 7th of April 1818, in consequence of his having applied to the magistrates for a distress warrant to obtain it; and that he always received the rates from Rosevear, who never referred him to any other person for payment. Evidence

The committee determined, That the vote of John Rosevear should stand on the poll. Vote good.

The solicitor to the commission produced the commission of bankruptcy issued against Rosevear, and also the proceedings under it, from which the adjudication that he was a bankrupt, signed by the commissioners, was read. Evidence. Proof of bankruptcy.

This mode of proof was objected to by the counsel for the sitting members; but the committee held, "That the commission of bankruptcy and the proceedings thereon were sufficient."

CASE XIX.

SECOND CASE OF THE BOROUGH OF FOWEY, IN THE COUNTY OF CORNWALL.

The Committee was chosen on the 6th of May 1819, and consisted of the following Members:

The Right Hon. Charles Grant, (*Chairman.*)
Earl of Bective.
John Smith, Esq.
Francis William Grant, Esq.
Hon. Robert Curzon.
Thos. Tirwhytt Drake, Esq.
Edmund Hornby, Esq.
Richard Wogan Talbot, Esq.
Benj. Gaskell, Esq.
Lucius Concannon, Esq.
Edw. Synge Cooper, Esq.
John Innes, Esq.
Hon. Newton Fellowes.
William Courtney, Esq. for Petitioners. } Nominees.
John Singleton Copley, Esq. for the Sitting Member. } Nominees.

Petitioners: 1, Lord Viscount Valletort.
2, Electors.

Sitting Member: Matthias Attwood, Esq.

Counsel for Lord Valletort: Mr. Warren, and Mr. Adam.
for Electors: Mr. Gaselee, and Mr. G. R. Cross.
for Sitting Member: Mr. Harrison, Mr. Serj. Blosset, and Mr. Turton.

IN consequence of the resolution of the former committee (1), declaring that Lord Viscount Valletort was duly elected, and of the death of Lord Valletort since the election, a new writ was ordered and issued for the election of a new member to serve in his stead; in pursuance of which, an election took place on the 30th March 1819. At this election, Mr. Attwood and Lord Valletort (the brother of the deceased) were candidates, and upon the close of the poll, a majority of votes

(1) *Ante*, 166.

appeared in favour of Mr. Attwood, who was accordingly returned.

The petitions complained of the undue return of Mr. Attwood, and claimed the seat for Lord Valletort on various grounds; two only of which were however gone into, namely, 1. that many persons were rejected who were entitled to vote as inhabitants paying scot and lot, and who did tender their votes for Lord Valletort; and 2. that many persons were admitted to vote for Mr. Attwood, as inhabitants paying scot and lot, who were not entitled to vote as such. Petitions.

It will be seen, by referring to the former case, that in consequence of the rate of March 1818 having been quashed, a new rate for the relief of the poor of the borough and parish of Fowey was made on the 30th July 1818. That was the last rate preceding the election, which took place on the 20th March 1819; two appeals had been lodged against it at the October sessions 1818, one by a person of the name of Dugger, and one of the grounds of complaint was, that the rate had been made for election purposes: this petition was dismissed upon hearing; and the rate confirmed by the court of quarter sessions: the other appeal was by another individual, but was never tried, the notice of appeal having been countermanded. Facts of the case, *ante*, p. 131.

The petitioners proposed to strike off from the poll of the sitting member, the names of the thirty-five persons who had voted for him, but whose names were not on the rate, and to add to the poll of Lord Valletort twenty-four votes which had been rejected by the returning-officer, although their names were on the rate. Petitioners case.

The only evidence produced besides that of the poll-book and the rate, and the notices and proceedings in the appeals from it, was offered with the view of shewing that the twenty-four voters proposed to be added to the poll, had continued to inhabit within the borough and parish from the time of making the rate down to the election. Evidence.

Evidence to shew fraud in the rate of July;

An attempt was made by the counsel for the sitting member, to establish, by their cross-examination, that the rate of July 1818 was fraudulently made, and therefore did not afford a fair criterion of rateability.—This line of cross-examination was objected to by the petitioners counsel, on the ground that the rate had been confirmed by the decision of the court of quarter sessions on the appeal.

The counsel for the sitting member contended, that fraud might always be shewn; that the dismissal of the appeal could not preclude him from going into evidence to prove it, as the appeal might be fraudulent as well as the rate; and that the appeal having been made by an individual, the dismissal of it proved nothing more than that such individual had no cause of complaint, and left the rate, as to the rest of it, only in the state of a rate not appealed from.

rejected.

The committee determined, that the counsel for the sitting member should not be allowed to proceed in his examination to prove fraud in the rate.

Agents directed to compare the rate-book and the poll.

The committee then directed, that in order to save time, the agents should meet and examine whether the thirty-five votes objected to by the petitioners on the ground of not being rated, were or were not upon the rate which had been put in, and whether the twenty-seven persons proposed to be put on the poll by the petitioners, were or were not upon the rate.

The result of this examination was, that it appeared that of the thirty-five votes objected to by the petitioners, thirty-four were not on the rate which had been put in, and that of the twenty-seven votes tendered, twenty-four were on the rate.

Sitting member's case.

The counsel for the sitting member having opened his case, proceeded to examine witnesses, to prove that the thirty-four voters whose names did not appear on the rate, were possessed of rateable property six months previous to the election, which was objected to by the

counsel for the petitioner, who contended, that the rate of July 1818, being the last rate made before the election, was the best evidence of rateability. That it was for the sitting member, before he attempted to shew that persons not on that rate possessed rateable property, to prove that they had entitled themselves to vote, by using due diligence to be put on the rate. Argument for petitioner.

On the part of the sitting member it was contended, that the rate was no rule, unless it could be shewn that there was no intermediate rate; and that it was as much incumbent on the petitioners as on the sitting member, to shew that due diligence had been used to get an intermediate rate, in order to entitle them to make use of a rate dated so long back as that of July:—That the rate was retrospective, and therefore could not have any reference to the time of the election; but that even if it had been prospective, being only a six month's rate, it would have ceased to operate at the time of the election:—That the act (1) required that a person admitted to vote as a scot and lot voter, should have been such six months before the election, and that therefore this rate, which was made nine months before the election, could not be of any use here, because if due diligence had been used, there might have been another:—That at all events, the sitting member's votes could not be prejudiced by their having taken no steps to be put on the rate, since no legal proceedings with respect to this rate, which was nine months before the election, could have been of any avail:—That there was a great difference between the rule as to legal proceedings as applied to a rate within the six months, and as applied to one without it; and that there was no case in which it had been held necessary to take measures to be placed on a rate made nine months before the election:—That the danger of admitting such a rule, as applied to rates made more than six months before the election would be great, since as the legal process would be Argument for sitting member.

(1) 26 Geo. III, c. 100.

barred by the lapse of a sessions, the rate would remain conclusive to all time, so that if any legal proceedings were necessary, they must have been to procure a new rate, and that the objection would therefore apply as well to those who were on the rate, as to those who were off it.

Decision. The committee determined, that counsel should not be permitted to go into evidence for the purpose of establishing the rateability of any persons not on the rate, in respect of property of which they were possessed previously to the 30th of July, or of which they became possessed within six months previously to the election.

Offer to prove non-payment of a preceding rate; The counsel for the sitting member then stated, that they were not prepared with evidence to shew that any of the voters for the sitting member had become possessed of rateable property after the making of the July rate; and then proceeded to prove, that some of the twenty-four votes proposed to be added by the petitioners, had not

objected to. paid the rate of March 1818. But this was objected to by the counsel for the petitioner, who contended, that such evidence was irrelevant to the present question, as the rate was made more than six months before the election. They also insisted, that the rate had been quashed before the election, and that of July substituted for it, and that the ground upon which the former committee had proceeded in rejecting the votes of persons who had not paid that rate, was, that it was an existing rate at the time of the election (1).

(1) Vide G. Jewell's vote, *ante*, 143. To this it was answered, by the counsel for the sitting member, that the argument of its being necessary to have recourse to a rate made six months before the election had been negatived by the last decision of the committee; and that the July rate was not a substitution for the March rate, the March rate having been a rate for three quarters of a year, and that for July for a whole year

The committee determined, that the counsel for the

sitting member should not be allowed to go into evidence of the rate of March 1818, or the payments under it.

The counsel for the sitting member then informed the committee, that they would not offer any further evidence, it being out of the power of the sitting member to shake the majority for the petitioner, which the decisions of the committee had established: and consequently the committee resolved,

Sitting member gives up his case.

That Mr. Attwood was not duly elected, and that Lord Valletort was, and ought to have been returned.

Resolution.

They also resolved, That the opposition of Mr. Attwood to the petition did not appear to be frivolous or vexatious.

After the production of the poll the counsel for the petition stated that the poll-clerk was not in immediate attendance, but submitted that the entry on the poll-book of the tender of particular persons was sufficient evidence of the tender. After hearing counsel on the other side, the committee determined,

Incidental point. Entry in poll-book a sufficient evidence of tender.

That the entries on the poll-book should be received as *primâ facie* evidence of the tender.

APPENDIX.

BOROUGH OF SHAFTESBURY IN THE COUNTY OF DORSET *.

The Committee was chosen on the 9th of February 1813, and consisted of the following Members:

John Blackburne, Esq. (*Chairman.*)
Pownall Bastard Pellew, Esq.
Theodore Henry Broadhead, Esq.
Henry St. Paul, Esq.
John Calvert, Esq.
Thomas Grosvenor, Esq.
Lord Arthur Somerset.
Earl Gower.
Wilbraham Egerton, Esq.
George Porter, Esq.
John Harcourt, Esq.
William Lowndes, Esq.
John Henry Smyth, Esq.
Charles Dundas, Esq. for the Petitioners. } Nominees.
William Smith, Esq. for the Sitting Members. } Nominees.

Petitioners: { 1. C. Wetherell, Esq. and Lieut.-col. Kerrison.
2. Electors.

Sitting Members: Richard Bateman Robson, Esq. and Hudson Gurney, Esq.

Counsel for the Petitioners: Mr. Warren and Mr. Nolan.
for the Sitting Members: Mr. Adam, Mr. Serj. Pell, and in the absence of either, Mr. Bowen.

THE Petition alleged, that many legal votes tendered for the petitioners, had been rejected at the election, and that many persons not legally entitled to vote, had been admitted to vote for the sitting members. Petition.

* Vide note to Fowey, p. 169.

Last determination.

By a resolution of the House of Commons, dated 29th February 1695, the right of election in the borough of *Shaftesbury*, was declared to be only in the inhabitants paying scot and lot.

The principal question decided by the committee appears to have been, whether the names of twenty-seven persons whose names were on the poor's rates, but whose votes had been rejected at the election, on the ground of their not paying their rates when demanded, should be added to the poll? The counsel for the petitioners contending, that the words "paying scot and lot," in the last determination, meant "*rated and liable to pay*;" and the sitting members counsel, on the other hand, relying on the decision of the committee on the Bridgewater election in 1803, by which it was determined, "That persons rated and not having paid the rates before the day of election, the rate having been legally demanded, and no fraud appearing on the part of the overseers, were disqualified from voting (1)."

(1) 1 Peck. 108.

Committee proceed to hear arguments on the abstract question,

The petitioners counsel, after having opened their case, proposed to the committee, that previously to their calling evidence on the other points of the petitioners case, the right of voting, as declared in the resolution of February 1695, should be settled by the committee.

whether scot and lot voters are disqualified bynon-payment on demand.

This course of proceeding was objected to by the counsel for the sitting members, who contended that the counsel for the petitioners should not be allowed to argue the abstract right of voting, until they had called evidence to support the other parts of their case; and after considerable argument, the committee determined, that they would proceed to hear the arguments of counsel on the question, *whether persons rated and not having paid the rates before the day of the election, the rate having been legally demanded, and no fraud appearing on the part of the overseers, were disqualified from voting?*

After hearing the arguments of counsel on both sides, the committee came to the following resolution; Decision.

That this committee does not confirm the resolution of the Bridgewater committee, on which the counsel have been heard, and that the counsel for the petitioners be directed to proceed.

The committee afterwards came to another resolution to the following effect; viz.

That having overruled the objection against the votes of the twenty-seven men, on the simple ground of their not having paid the last rates when demanded, they will be considered as good votes, unless other objections are made to them, which the counsel for the sitting members are at liberty to go into.

The committee determined, that the votes of all those persons who were rejected on account of non-payment of rates, ought to have been received and placed on the petitioners poll.

The committee ultimately resolved, that the sitting members were not duly elected, and that Mr. Wetherell and Colonel Kerrison were and ought to have been returned. Resolution.

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